Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

EARMON ALVIN WALLACE, SR.,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTION PRESENTED

Where a certified drug detection dog alerts to the presence of narcotics while scanning the exterior of a car with multiple occupants, is there probable cause to arrest all occupants of the car?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the Court of Appeals of Maryland.

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 372 Md. 137, 812 A.2d 291 (2002) (App. 2a-24a). The opinion of the Court of Special Appeals of Maryland is reported at 142 Md. App. 673, 791 A.2d 968 (2002) (App. 25a-56a). The opinion of the Circuit Court for Anne Arundel County denying Wallace's motion to suppress is unreported. (App. 57a-62a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Maryland reversing Wallace's conviction was filed on December 11, 2002. (App. 2a). The order of the Court of Appeals of Maryland denying the State's motion for reconsideration was filed on February 11, 2003. (App. 1a). This petition is filed within 90 days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:
Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At approximately 3:00 a.m. on July 9, 2000, Officer Jessica Hertik stopped a four-door Buick, in which Wallace was a passenger, for speeding and going through a red light. (App. 3a). There were five people in the car: the driver; a front seat passenger; and three back seat passengers, one of whom was Wallace. (App. 3a). Officer Hertik recognized Wallace and two of the other passengers from a previous encounter. (App. 3a).

While Officer Hertik was preparing to run a license check on the driver and write traffic citations, Officer Elizabeth Nelson arrived on the scene with Bosco, her certified drug detection dog. (App. 4a, 26a, 58a). Officer Nelson was a seven-year veteran police officer, who had been a certified K-9 officer for four years. (App. 4a). Both Officer Nelson and Bosco engaged in extensive training and updating of their skills each year. (App. 4a).

While Officer Hertik was running the license check and writing the traffic tickets, Bosco scanned the Buick. (App. 4a). Bosco made two positive alerts to the presence of drugs at the front and rear seam of the driver's side front door. (App. 4a). Officer Nelson testified that when the dog alerts to the presence

of narcotics in the vehicle, it is a general alert, as opposed to an alert that is particular to any part or location within the vehicle. (App. 4a). Because of various factors that cause unpredictable air currents, there is little correlation between where a dog alerts and where drugs are eventually found. (App. 4a).

Officer Nelson advised Officer Hertik, who was still in the process of writing tickets, that Bosco had made a positive alert on the vehicle. (App. 4a). Officer Hertik approached the Buick, informed the driver that she suspected that the vehicle contained drugs, and asked the occupants to exit the vehicle so the police could search them. (App. 4a).

By this time, other officers had arrived on the scene, including Officer Jonathan Supko. (App. 4a). The three male occupants of the car were searched by Officer Supko. (App. 4a-5a). During the search of Wallace, Officer Supko felt a hard object near his groin. (App. 5a). Officer Supko then handcuffed Wallace, and walked him to a grassy area farther away from the road in order to complete the search. (App. 5a). As they walked over to that grassy area, Wallace moved his hips in an apparent effort to shake the object loose. (App. 5a). Officer Supko then saw a clear plastic baggie, containing several pieces of suspected cocaine, protruding from Wallace's left pants leg. (App. 5a). Wallace was then placed under arrest. (App. 5a).

The Buick was also searched. (App. 5a). Officer Hertik found $1,155 in cash in a pair of shorts on the front passenger seat, and a knife in a purse on the back seat. (App. 5a). No drugs were found inside the car. (App. 5a).

A hearing was held on Wallace's motion to suppress evidence on February 1, 2000. (App. 2a). The suppression court issued a written opinion on February 3, 2000, ruling that the arrest and search of Wallace was supported by probable cause. (App. 62a). On September 28, 2000, following a bench trial, Wallace was convicted on an agreed statement of facts and was found guilty of possession with intent to distribute cocaine. (App. 2a). Wallace was sentenced to a term of twenty

years' incarceration, with all but five years suspended, on November 29, 2000. (App. 2a).

On appeal, a three-judge panel of the Court of Special Appeals of Maryland unanimously reversed Wallace's conviction. (App. 25a-56a). On certiorari review, the Court of Appeals of Maryland affirmed the Court of Special Appeals' decision, in a five-to-two decision. (App. 2a-24a). According to the majority, although the canine alert provided probable cause to search the automobile without a warrant, (App. 23a), "a positive canine scan to a vehicle's interior compartment generally, without more, does not rise to probable cause to search all passengers of that vehicle." (App. 22a). In reaching that conclusion, the Court of Appeals relied extensively upon its prior decision in *Pringle v. State*, 370 Md. 525, 805 A.2d 1016 (2002), *cert. granted*, *Maryland v. Pringle*, 123 S.Ct. 1571 (March 24, 2003) (No. 02-809), in which it held that the presence of secreted contraband in a vehicle did not give rise to probable cause to arrest a passenger in that vehicle. (App. 12a-14a, 18a, 22a).[1]

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[1]*Pringle* involved only the issue of probable cause to arrest, as there was no issue in that case regarding any search performed incident to the arrest. In *Wallace*, the Court of Appeals generally refers to probable cause to search, rather than arrest, the passengers; however, in the context of this case, those references pertain to probable cause to search the passengers incident to their arrest. Under *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), if probable cause to arrest exists, it is permissible to perform a search of the person prior to formal arrest. That is exactly what occurred in this case: the drug detection dog alerted on the car in which Wallace was a passenger; Wallace was searched; and then he was placed under formal arrest. (App. 4a-5a). Thus, as the search and arrest of Wallace were essentially contemporaneous, the search was a legal one, incident to the arrest.

REASONS FOR GRANTING THE WRIT

I. This Court Should Hold This Case Pending Its Decision in *Maryland v. Pringle*.

The general issue presented by this case–the existence of probable cause to arrest multiple persons found in the vicinity of drugs–is pending before this Court in *Maryland v. Pringle*, No. 02-809. *Pringle* presents the issue whether, where drugs and a roll of cash are found in the passenger compartment of a car with multiple occupants, probable cause exists to arrest the occupants of the car. This case presents the similar issue whether, where a certified drug detection dog alerts to the presence of narcotics while scanning a car with multiple occupants, probable cause exists to arrest the occupants of the car.

In deciding *Pringle*, this Court likely will resolve whether the Fourth Amendment permits police to arrest all the occupants of a car where drugs are present in that car, but are not more specifically tied to a particular occupant. The same rationale would apply whether the drugs are physically observed by police, as in *Pringle*, or whether a dog alerts to the presence of the drugs, as in this case. Indeed, as the Court of Appeals of Maryland made clear, its decision in this case was largely based on its previous decision in *Pringle*. (App. 22a). Likewise, this Court's decision in *Pringle* may essentially be dispositive of the instant case. Thus, Petitioner requests that this Court hold the petition for writ of certiorari in this case, pending disposition in *Pringle*.

II. This Court Should Review This Case to Resolve Conflict in the Lower Courts on the Issue of Probable Cause Where a Certified Drug Detection Dog Alerts to the Exterior of a Car Containing Multiple Occupants.

In the alternative, Petitioner requests that this Court issue a writ of certiorari in this case in order to expand upon its decision in *Pringle* in an analogous context. For, in addition to the more general issue of probable cause in multi-suspect cases that is presented both here and in *Pringle*, this case presents additional issues unique to situations involving drug detection dogs. Furthermore, the lower courts that have addressed those issues have reached conflicting results.

A canine alert on the exterior of a vehicle is, by its very nature, a general alert; it does not identify any particular location in that vehicle or any particular person seated in that vehicle. (App. 4a). Thus, a canine alert situation presents the additional complexity that it cannot be known whether the drugs are secreted on one or more of the occupants, or elsewhere in the vehicle, or both. Accordingly, a canine alert situation may well be viewed as presenting a slightly different probable cause analysis than that in *Pringle*.

Although this Court has never addressed the issue presented in this case, it has spoken to issues regarding drug detection dogs several times in the past. In *Florida v. Royer*, 460 U.S. 491 (1983), a plurality of this Court declared that a positive alert by a drug detection dog on an individual's luggage "would have resulted in his justifiable arrest on probable cause." *Id.* at 506. Later that same year, in *United States v. Place*, 462 U.S. 696 (1983), this Court held that a canine scan of luggage does not constitute a "search" within the meaning of the Fourth Amendment. *Id.* at 707. This Court discussed the issue as follows:

> A "canine sniff" by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose noncontraband items that otherwise would remain

> hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine – did not constitute a "search" within the meaning of the Fourth Amendment.

Id.

More recently, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court addressed the issue of drug detection dogs in the context of car scans, as follows:

> The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search . . . . Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics . . . . Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search."

Id. at 40.

However, this Court has never spoken to the issue presented here: whether a canine alert to narcotics in a vehicle with multiple occupants, without more, gives rise to probable cause to arrest the occupants. Understandably, then, there has been conflict in the lower courts over that issue.

In one line of cases, the courts have found that a canine alert on a vehicle provides probable cause not only to search the vehicle itself, but also to arrest the occupants of that vehicle. *See United States v. Klinginsmith*, 25 F.3d 1507, 1510 (10th Cir.) (when dog alerted to presence of drugs in car, officers had probable cause to search car and arrest the occupants), *cert. denied*, 513 U.S. 1059 (1994); *United States v. Garcia*, 52 F. Supp. 2d 1239, 1253 (D. Kan. 1999) (once dog alerted on two vehicles, officers had probable cause to arrest all occupants of both vehicles). *Cf. People v. Staley*, 778 N.E.2d 362, 369-70 (Ill. App. 2002) (probable cause to search passenger arose from circumstances which included dog alert to the interior of the vehicle in which he had been riding).

In a second line of cases, however, the courts have found that a canine alert to the vehicle does not provide probable cause to authorize the arrest of its passengers. The decision of the Court of Appeals of Maryland in this case typifies the reasoning employed in those cases: "while the alert by a drug dog trained to detect contraband, undisputedly, gave the police probable cause to believe there was contraband somewhere in the car or on the person of someone in the car, the canine sniff of the vehicle alone did not amount to probable cause to then search each of the passengers." (App. 18a-19a). Rather, the court suggested that the officers should "simply [have] had Bosco sniff each of the passengers of the car prior to searching them." (App. 19a). *See also State v. Kelly*, No. 2000-P-0113, 2001 WL 1561543, at *3 (Ohio App. 2001) (canine alert to the presence of drugs in a car gave police probable cause to search the interior of the car, but not to search the occupants of the car, as "[t]here was no claim the dog 'indicated' that appellant had

drugs on his person").

Two cases issuing from the same Illinois court illustrate the problems with this approach, and highlight the conflict in this area of the law. In *People v. Fondia*, 740 N.E.2d 839 (Ill.App. 2000), a dog alerted to the presence of drugs in a car, and the court concluded that this provided officers "with probable cause to believe that controlled substances were somewhere either within the car or on the person of one or more of its occupants." *Id.* at 842. Yet, the court held the search of the passenger was unlawful because the officers did not conduct a further dog sniff of Fondia's person, and thus "willfully denied themselves this additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of 'willful ignorance.'" *Id.* at 842.

However, two years later, in *Staley*, that same court distinguished *Fondia* and held that the need for a dog sniff of each individual in a vehicle was vitiated by the aggressive nature of the dog in that case. 778 N.E.2d at 369-70. As the concurring opinion stated:

> As I understand it, we are abandoning the holding in *Fondia* that after a drug-sniffing dog has alerted on a vehicle, indicating the presence of drugs, the police may not conduct a search of the passengers until the police have conducted a canine sniff of the passengers themselves. We now accept the proposition that a canine sniff of an individual is not feasible, because of the danger to that individual if the dog should alert on the individual.

Id. at 370 (Cook, J. concurring).

These conflicting decisions highlight the importance of resolving the issue of probable cause to arrest in the canine alert context. This Court has recognized the limited nature of the intrusion when a drug detection dog sniffs an inanimate object, such as luggage or an automobile. *See Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. However, it has not spoken to the issue of a dog sniff performed on a person, which may

present different concerns. *See Doe v. Renfrow*, 451 U.S. 1022, 1025 (1981) (Brennan, J., dissenting from denial of certiorari) (where drug detection dog was scanning students at a school and repeatedly jabbed its nose into the petitioner's legs, she "testified that the experience of being sniffed and prodded by trained police dogs in the presence of the police and representatives of the press was degrading and embarrassing").

Thus, the general need for resolution of the issue of probable cause to arrest in the multiple suspect context is particularly acute in situations involving canine alerts on vehicles. Police need the clarity of authority to know how to proceed in such cases.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari be held pending this Court's disposition in *Maryland v. Pringle*, No. 02-809, and that it be disposed of in light of the Court's decision in that case. In the alternative, the State of Maryland requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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May 8, 2003

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APPENDIX A:

Order of the Court of Appeals of Maryland, dated February 11, 2003, denying motion for reconsideration in *State of Maryland v. Earmon Alvin Wallace, Sr.*, No. 29, September Term, 2002 ..... 1a

APPENDIX B:

Reported opinion of the Court of Appeals of Maryland, filed December 11, 2002, *State of Maryland v. Earmon Alvin Wallace, Sr.*, 372 Md. 137, 812 A.2d 291 (2002) 2a

APPENDIX C:

Reported opinion of the Court of Special Appeals of Maryland, filed February 27, 2002, *Earmon Alvin Wallace, Sr. v. State of Maryland*, 142 Md. App. 673, 791 A.2d 968 (2002) 25a

APPENDIX D:

Unreported Memorandum Opinion and Order of the Circuit Court for Anne Arundel County, Maryland, dated February 3, 2000, *State of Maryland v. Earmon Alvin Wallace, Sr.*, Criminal No. K-99-1173 ..... 57a

APPENDIX A

STATE OF MARYLAND	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	No. 29
EARMON ALVIN WALLACE, SR.	*	September Term, 2002

ORDER

The Court having considered the Motion for Reconsideration filed in the above-captioned case, it is this 11th day of February, 2003

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, DENIED.

/s/ ROBERT M. BELL
Chief Judge

APPENDIX B

Court of Appeals of Maryland.

STATE of Maryland
v.
Earmon Alvin WALLACE, Sr.

No. 29, Sept. Term, 2002.

Dec. 11, 2002.

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

CATHELL, Judge.

On July 26, 1999, respondent was charged in a three-count indictment with various narcotics violations arising from his arrest on July 9, 1999. On February 1, 2000, the Circuit Court for Anne Arundel County held a hearing on a pre-trial motion to suppress evidence during which respondent argued that his search was not based upon probable cause and as a result the contraband seized from him on the night of his arrest should not be permitted into evidence at trial. On February 3, 2000, the motions court filed a written opinion denying respondent's motion to suppress. On September 28, 2000, following a bench trial, respondent was convicted on an agreed statement of facts and was found guilty of possession with intent to distribute cocaine. On November 29, 2000, that court sentenced respondent to 20 years' incarceration, with all but five years suspended. On December 14, 2000, respondent noted a timely appeal to the Court of Special Appeals. On February 27, 2002, in a reported opinion, the intermediate appellate court reversed the judgment of the circuit court. *Wallace v. State,* 142 Md.App. 673, 791 A.2d 968 (2002). On June 10, 2002, we

granted the State's Petition for Writ of Certiorari. *State v. Wallace,* 369 Md. 301, 799 A.2d 1262 (2002). Petitioner presents one question for our review:

> "Did the Court of Special Appeals incorrectly hold that a passenger in a vehicle could not be searched after a drug dog has alerted an officer to the presence of illegal drugs in the vehicle, notwithstanding that the alert provided probable cause to believe drugs were present in the vehicle and/or on the person of one or more of the occupants of the vehicle?"

We affirm the judgment of the Court of Special Appeals, answer no to petitioner's question, and hold that the police did not have probable cause to search respondent, a passenger in the vehicle. Further, we hold that the Court of Special Appeals properly held that a positive canine alert to contraband in a vehicle, without more, does not establish probable cause to search all of the passengers in a vehicle.

I. Facts

On July 9, 2000, at approximately 3:00 a.m., Officer Jessica Hertik was driving her marked police car eastbound on Forest Drive in Annapolis, Maryland. As she approached Hilltop Lane, a forty mile per hour road, she observed a four-door Buick driving at a high rate of speed in the opposite direction. She made a U-turn and accelerated to 90 m.p.h. to catch up to the Buick. In addition to speeding, Officer Hertik saw the vehicle run a red light. Officer Hertik then activated her emergency equipment and the Buick pulled over.

Officer Hertik stopped behind the vehicle, exited her car and approached the driver's side of the Buick. Sitting inside of the vehicle was the male driver, a male front seat passenger, and three back seat passengers–respondent and two women. Officer Hertik recognized respondent and two of the other passengers from a previous encounter, although in her testimony at the suppression hearing she did not describe that encounter. She informed the driver that she had stopped the

vehicle for speeding and for not stopping at a traffic light. The driver of the car complied when Officer Hertik requested to see his driver's license and car registration.

When Officer Hertik walked back to her car, she met another officer who had arrived at the scene. She was Officer Elizabeth Nelson who was on duty with Bosco, her drug detection dog.[1] Officer Hertik explained what had occurred and then proceeded to run a license check and write two tickets. In the meantime, other police units had arrived on the scene and these additional officers watched the Buick while Bosco scanned the vehicle. Bosco made two positive alerts to the presence of drugs at the front and rear seam of the driver's side front door. Officer Nelson testified that, because of various factors, *i.e.,* air currents in the vehicle, there is little correlation between where a canine alerts and where drugs are found in the vehicle; rather it is just a general alert to the whole of the passenger compartment of the car itself.

Officer Nelson advised Officer Hertik, who was still in the process of writing tickets, that Bosco had made a positive alert on the vehicle. While Officer Nelson returned Bosco to her patrol car, Officer Hertik approached the Buick to speak with the driver. She informed the driver that she suspected that the vehicle contained drugs and asked the occupants to exit the vehicle so the police could search them.

The occupants were taken out of the car one at a time and searched while the others remained in the car. The other officers watched the occupants of the car while the searches were being conducted. Officer Jonathan Supko, one of the officers who had arrived at the scene, searched the three males.

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[1] Officer Nelson had been with the Annapolis City Police Department for seven years and had been a certified K-9 officer for four of those years. Testimony at the suppression hearing revealed that both Officer Nelson and Bosco have undergone extensive training and updating of their skills each year.

Officer Supko testified that his actions were not a mere "frisk" or "pat down" but were intended to discover anything suspicious, for "anything apparent . . . [w]eapons and what not." Officer Supko first searched the driver and then he searched the front seat passenger.

Officer Supko next searched respondent, who was sitting behind the front passenger seat. During the search Officer Supko felt a hard object near respondent's groin, which he said he knew was not a gun, knife, or other weapon. Officer Supko handcuffed respondent with his hands behind his back, told him he was "not under arrest at th[at] time" and walked him to a grassy area away from the road to complete the search. Officer Supko stated that he had handcuffed respondent "just for my safety and his safety."

As they walked over to the grassy area, respondent moved his hips in an apparent attempt to shake the object loose. When the officer searched respondent's groin area again, the object was gone. Officer Supko saw, however, something protruding from respondent's left pants leg, which turned out to be a clear plastic baggie containing several pieces of suspected cocaine. Respondent was placed under arrest.

The two females were searched after respondent. Officer Hertik searched one of them herself. Officer Hertik searched the vehicle only after each of the occupants of the car was searched. She found $1,155 in cash in someone's shorts in the front passenger seat and a knife in a purse in the backseat. No drugs were found in the car.

Respondent alleged at a suppression hearing that there was not probable cause for his search and, as a result, the cocaine seized from him at the time of his search should be suppressed as evidence to be used at trial. The trial court denied his suppression motion and respondent was, as indicated *supra,* ultimately convicted of possession with intent to distribute cocaine. On appeal, the Court of Special Appeals reversed the judgment of the circuit court and that court's denial of respondent's motion to suppress.

II. Standard of Review

Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. *Carter v. State,* 367 Md. 447, 788 A.2d 646 (2002); *Ferris v. State,* 355 Md. 356, 368, 735 A.2d 491, 497 (1999); *In re Tariq A-R-Y,* 347 Md. 484, 488, 701 A.2d 691, 693 (1997), *cert. denied,* 522 U.S. 1140, 118 S.Ct. 1105, 140 L.Ed.2d 158 (1998); *Simpler v. State,* 318 Md. 311, 312, 568 A.2d 22, 22 (1990); *Trusty v. State,* 308 Md. 658, 670, 521 A.2d 749, 755 (1987). When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. *See Scott v. State,* 366 Md. 121, 143, 782 A.2d 862, 875 (2001); *Riddick v. State,* 319 Md. 180, 183, 571 A.2d 1239, 1240 (1990); *Simpler,* 318 Md. at 312, 568 A.2d at 22. Even so, we review legal questions *de novo,* and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. *See Stokes v. State,* 362 Md. 407, 414, 765 A.2d 612, 615 (2001) (quoting *Jones v. State,* 343 Md. 448, 457-58, 682 A.2d 248, 253 (1996)); *Wilkes v. State,* 364 Md. 554, 569, 774 A.2d 420 (2001); *In re Tariq A-R-Y,* 347 Md. at 489, 701 A.2d at 693. We will not disturb the trial court's factual findings unless they are clearly erroneous. *See Wengert v. State,* 364 Md. 76, 84, 771 A.2d 389, 394 (2001).

III. Discussion

Petitioner contends that a positive canine alert in and of itself provides the police with probable cause to search all passengers in an automobile and that the Court of Special Appeals improperly held that the positive canine alert in this case did

not give the police probable cause to search respondent on the night in question. As indicated *supra,* we disagree with petitioner's contention and affirm the decision of the Court of Special Appeals.

The Fourth Amendment to the United State's Constitution states:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

There are certain well-defined exceptions to the Fourth Amendment's requirement that searches be based upon probable cause and conducted pursuant to a valid warrant, but for purposes of this opinion we need not note or discuss them all. *See generally, United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427(1973) (permitting a search of a person incident to a full custody arrest supported by probable cause to effectuate the arrest–the "search incident to arrest" exception) and *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (permitting the warrantless search of a passenger compartment of a vehicle incident to a lawful custodial arrest).[2]

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[2] We note that the night respondent was arrested he was first asked to exit the vehicle and a police officer began to search him not as a "frisk" or "pat down" but to find anything "suspicious." During this search, the officer felt something hard, which he admitted was not a gun, a knife or a weapon, but put handcuffs on respondent for safety and told respondent he was "not under arrest at the time." Petitioner did not contend, prior to this appeal, that respondent was "arrested" at the time of his "search" potentially making his search lawful as a search incident to an arrest. *See Klauenberg v. State,* 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be

There is no argument made in this case that the warrantless search of the four-door Buick did not meet the constitutional requirements of the Fourth Amendment and that the search of the car was based upon probable cause. Nor, is there any argument that the actions taken by the officers up to and including the canine sniff of the Buick were anything but proper and, thus, provided the police officers with probable cause to search the car. Accordingly, we do not directly address these events except as necessary to address the issue presented.

In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirements, an exception such as the search incident to a lawful arrest exception set forth many years later in *Robinson*, referenced *supra.* Presently known as the "Carroll Doctrine," the exception allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a crime–connected item is within the car. Following *Carroll,* the Supreme Court has held that during a lawful traffic stop officers can compel the driver of a vehicle to exit the car. *See Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The *Mimms* holding was extended to passengers as well. *See Maryland v. Wilson*, 519 U.S. 408, 410-11, 117 S.Ct. 882, 884-85, 137 L.Ed.2d 41, 45-46 (1997). Since *Wilson,* with the case of *Wyoming v. Houghton,* 526 U.S. 295, 307, 119 S.Ct. 1297, 1303-04, 143 L.Ed.2d 408, 419 (1999), the Supreme Court has gone on to hold that a passenger's property left within a vehicle, when occupants are ordered out of a car, falls within the permissible scope of a "*Carroll* Doctrine" warrantless search.

Further, the law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband,

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considered on appeal.").

sufficient probable cause exists to conduct a warrantless "*Carroll*" search of the vehicle. *See Gadson v. State,* 341 Md. 1, 668 A.2d 22 (1995), *cert. denied,* 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 803 (1996); *Accord United States v. Dovali-Avila,* 895 F.2d 206, 207 (5th Cir.1990); *In re Montrail M.*, 87 Md.App. 420, 437, 589 A.2d 1318, 1327 (1991).

In this opinion we focus solely on the narrow question of whether the police officers had probable cause to search respondent, who was not the owner or driver but a mere passenger of the automobile, based only upon a positive canine alert that drugs were somewhere in the interior of the automobile.

a. Probable Cause

In order for a warrantless search or arrest to be legal it must be based upon probable cause.[3] Regarding arrests we have held

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[3] We note that our discussion of probable cause includes cases where probable cause to arrest was at issue. Nonetheless, our discussion of probable cause generally and whether there was probable cause to search respondent in this case is based upon the same standard for probable cause to arrest, because, "In terms of quantifiable probability, moreover, the probable cause for a . . . search is the same as the probable cause for a warrantless arrest. Whatever the possible occurrence or circumstance, the likelihood of which we are assessing, probable cause itself is a constant. It does not take more probable cause to support a warrantless arrest than it does to support a warrantless . . . search. The classic *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), definition of probable cause is used for both situations, with no distinction made between the predicate for a[ ] . . . search and the predicate for a lawful arrest. . . . The measure of likelihood is the same." *State v. Funkhouser,* 140 Md.App. 696, 721, 782 A.2d 387, 402 (2001). Further, the United States Supreme Court stated in *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245 (1979), that "[w]here the standard is probable cause, a

that a police officer can arrest an accused without a warrant if the officer has probable cause to believe that a crime has been or is being committed by an alleged offender in the officer's presence, the general standard for probable cause. *Woods v. State,* 315 Md. 591, 611-12, 556 A.2d 236, 246 (1989); *Nilson v. State,* 272 Md. 179, 184, 321 A.2d 301, 304 (1974).[4]

We have gone on to state that:

> "Probable cause, we have frequently stated, is a nontechnical conception of a reasonable ground for belief of

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search *or* seizure of a person must be supported by *probable cause particularized with respect to that person.*" (emphasis added).

[4] Maryland Code (2001), section 2-202 of the Criminal Procedure Article states:

> **" § 2-202. Warrantless arrests–In general.**
>
> (a) *Crime committed in present of police officer.*–A police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of a police officer.
>
> (b) *Probable cause to believe crime committed in the presence of officer.*–A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime.
>
> (c) *Probable cause to believe felony committed.*–A police officer without a warrant may arrest a person if the police officer has probable cause to believe that a felony has been committed or attempted and the person has committed or attempted to commit the felony whether or not in the presence or within the view of the police officer."

This provision of the Criminal Procedure Article in respect to arrest generally is language derived without substantive change from former Article 27, section 594B(a), (b) and (c) of the Maryland Code.

guilt. *Doering v. State,* 313 Md. 384, 403, 545 A.2d 1281 (1988); *Edwardsen v. State,* 243 Md. 131, 136, 220 A.2d 547 (1966). A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion. *Woods, supra,* 315 Md. at 611, 556 A.2d 236; *Sterling v. State,* 248 Md. 240, 245, 235 A.2d 711 (1967); *Edwardsen, supra,* 243 Md. at 136, 220 A.2d 547. Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge. *State v. Lemmon,* 318 Md. 365, 379, 568 A.2d 48 (1990); *Doering, supra,* 313 Md. at 403-04, 545 A.2d 1281. Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person arrested. *Woods, supra,* 315 Md. at 611, 556 A.2d 236; *Stevenson v. State,* 287 Md. 504, 521, 413 A.2d 1340 (1980); *Duffy v. State,* 243 Md. 425, 432, 221 A.2d 653 (1966). Therefore, to justify a warrantless arrest the police must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. *Lemmon, supra,* 318 Md. at 380, 568 A.2d 48." *Collins v. State,* 322 Md. 675, 680, 589 A.2d 479, 481 (1991).

To determine whether an officer had probable cause in a specific case, here probable cause to search, "the reviewing court necessarily must relate the information known to the officer to the elements of the offense that the officer believed was being or had been committed." *DiPino v. Davis,* 354 Md. 18, 32, 729 A.2d 354, 361 (1999).

In the case *sub judice,* in order for respondent's warrantless search to be valid, the officer must have had probable cause at the time of the search to believe that respondent was in possession of a controlled dangerous substance. Possession is defined in the Maryland Code (2001), section 5-101(u) of the

Criminal Law Article as "exercis[ing] actual or constructive dominion or control over a thing by one or more persons." This statute recognizes, as we have held, that possession may be constructive or actual, exclusive or joint. *State v. Leach,* 296 Md. 591, 596, 463 A.2d 872, 874 (1983).

b. Case Law

This Court has had the occasion to apply the elements of possession to cases involving a Fourth Amendment challenge, like the constitutional challenge which initiated the issue in the case *sub judice.* We had the occasion to do so very recently in *Pringle v. State,* 370 Md. 525, 805 A.2d 1016 (2002), where the defendant challenged his warrantless arrest for possession. In that case, Joseph Jermaine Pringle was a front seat passenger in a car being driven by its owner and there was another backseat passenger. The vehicle was pulled over for a routine traffic stop. During a search of the vehicle, a sum of rolled up money was found inside the closed glove compartment located in front of Pringle and drugs were found hidden behind a rear armrest. The officer who conducted the traffic stop only saw the money in the closed glove box when the driver/owner of the vehicle opened the glove compartment for the vehicle registration. The officer at the scene then asked the owner/driver of the car if he could search the vehicle and the owner/driver consented to the search. After the three occupants of the car were taken out of the vehicle, the officer searched the car and found five glassine baggies containing suspected cocaine hidden inside or behind an armrest in the backseat. The officer on the scene questioned all three men about the ownership of the drugs and money and told the three men that, if no one admitted to ownership of the drugs he was going to arrest them all. Because none of the three men offered any information regarding the ownership of the drugs and/or money, all three men were placed under arrest and transported to the police station.

Later, at the station house, Pringle acknowledged that the cocaine belonged to him. Subsequently, his friends, the owner/driver of the automobile and the other passenger, were released.

During a pre-trial suppression hearing, Pringle argued that the confession should be suppressed as the unlawful fruit of an illegal arrest because there was no probable cause for his arrest at the time of the traffic stop. The trial court denied his motion. Pringle made the same claim on appeal to the Court of Special Appeals. While we noted that the evidence might have constituted probable cause to arrest the owner or the driver of the vehicle, we held that Pringle's mere presence as a front seat passenger in an automobile in which contraband was found in a concealed place in the rear seat and where money was found in a closed glove compartment did not constitute probable cause to arrest Pringle. In her concurring opinion in *Pringle,* Judge Raker stated:

> "Apparently, proximity to concealed drugs is sufficient for the dissent to find probable cause to arrest. . . . Although it may be sufficient under certain circumstances, the discovery of three men riding in a car in the early morning hours, with some rolled money in a closed glove box and drugs hidden from view in a back arm rest, without more, hardly constitutes probable cause to arrest a front seat passenger who has no possessory interest in the automobile.
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> "I cannot improve on Judge Sonner's analysis . . . below:
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> '. . . I believe the majority has stopped far short of considering whether Pringle, in any way, knowingly exercised dominion or control over the secreted contraband, and has resorted instead to "speculation or conjecture." Although Pringle . . . may have been within an arm's reach of the drugs, in fact, to expose the drugs, he would have had to stretch his body, maneuver around the back of his seat, and pull down the arm rest. And . . . Pringle was not sitting in a closed car that emanated the pungent, easily detectable smell of marijuana, which were critical facts in Judge

> Moylan's analysis sustaining Folk's conviction thirty years ago. Although the majority [of the Court of Special Appeals] attaches some significance to the large roll of currency found in the glove compartment, located in front of Pringle's seat, cash, in and of itself, is innocuous and certainly less suspicious than the scales and cutting tools discounted by the Court of Appeals in *Leach*. Further, there was no showing whatsoever that Pringle, as a passenger in the car, had any connection to, or knowledge of, the money found within the glove compartment of someone else's car.'"

In *Collins, supra,* we also addressed a situation involving a warrantless arrest and a subsequent challenge to probable cause for that arrest. On September 20, 1988, at 3:00 a.m., Officer Holmes of the Salisbury Police Department noticed five men standing about five feet from a Mustang that was parked in the entrance to a car dealership. Officer Holmes approached the men and asked what they were doing. The driver of the Mustang, Steven Lewis, stated that they were looking at the BMW's. Officer Ewing arrived on the scene to assist Officer Holmes. Officer Ewing saw a 35mm film canister on the rear seat of the Mustang and he asked one of the men to retrieve the canister for him. Inside the canister, Officer Ewing found over twenty cellophane wrapped packets containing cocaine and proceeded to arrest all of the men, including Collins. Collins alleged at a suppression hearing that there was not probable cause for his arrest. The trial court denied his suppression motion and Collins was convicted of possession of cocaine.

Collins appealed and, before this Court, asserted that there was not probable cause for his arrest[5] He claimed that his mere

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[5] Collins specifically relied upon the case of *Livingston v. State,* 317 Md. 408, 564 A.2d 414 (1989), discussed *infra,* when he asserted lack of probable cause for his arrest at his motion to suppress hearing.

proximity to the incriminating evidence, or to an offender, was not enough for finding of probable cause for arrest. Collins also asserted that there was no further factual basis to connect him to the drugs or to having committed any crime. In addressing Collin's claims, we discussed the United States Supreme Court case of *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) and our *Livingston* case and ultimately held in favor of Collins that there was not probable cause for his arrest.

Di Re is not a canine alert case, but it has influenced the discussion in cases such as the one at bar. Di Re was seated in the front passenger seat of a vehicle from which an informant had purchased counterfeit gasoline ration coupons from the driver and the backseat passenger was seen holding the gasoline ration coupons. The police arrested and searched all three men. The Supreme Court held that Di Re's mere presence in a vehicle involved in criminal activity, without more, did not cause him to lose his right to be free from a search of his person. The Supreme Court explained:

> "There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject.
> . . .
>
> "An inference of participation in conspiracy does not seem to be sustained by the facts particular to this case. The argument that one who 'accompanies a criminal to a crime rendevous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons,

> it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged f[ro]m mere meetings." *Di Re,* 332 U.S. at 593, 68 S.Ct. at 228, 92 L.Ed. at 219-20.

Essentially, in *Di Re,* the Supreme Court held that "we are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587, 68 S.Ct. at 225, 92 L.Ed. at 216.

In *Livingston v. State,* 317 Md. 408, 564 A.2d 414 (1989), Wesley Livingston was one of three people in a vehicle that was stopped for speeding. Livingston, who was not the owner of the vehicle, was sitting in the backseat. During the stop, the state trooper saw two marijuana seeds on the floor of the front passenger's side. The state trooper arrested all three occupants of the car and upon searching Livingston pursuant to the arrest, the state trooper discovered cocaine and marijuana in Livingston's pocket. Livingston was charged with possession of cocaine with intent to distribute, possession of cocaine and possession of marijuana. We held that the two seeds on the floor in the front of the vehicle did not provide the state trooper with probable cause to arrest Livingston and then conduct a search incident to that arrest. Or, in the alternative, that the mere proximity to incriminating evidence or to an offender is not enough for a finding of probable cause for arrest generally.

In *People v. Fondia,* 317 Ill.App.3d 966, 251 Ill.Dec. 553, 740 N.E.2d 839 (2000), the Illinois Appellate Court considered a case with facts similar to the case *sub judice.* There, after a lawful traffic stop, an officer requested a police canine unit while he was conducting computer inquires and a warrants check. The driver and two passengers remained in the car while the canine gave a positive alert to drugs in the car, specifically near the rear seam of the driver's door. The police then had the driver exit the automobile and told the driver that the canine had given a positive alert to drugs in the car. The

police officer then searched the occupants of the vehicle and the vehicle itself. The defendant, Fondia, a backseat passenger, was removed from the car and told "that the dog had alerted and that [Officer] Gallagher was going to search him." *Fondia,* 251 Ill.Dec. 553, 740 N.E.2d at 841 (alteration added). The officer then put his hand into Fondia's pocket when he felt a metal tube that he recognized to be a crack pipe. The officer then removed the tube, handcuffed Fondia and completed the search. The tube field-tested positive for cocaine and Fondia was arrested for possession of drug paraphernalia.

In *Fondia,* it was also stipulated to that the traffic stop was lawful and that the dog was properly trained. The trial court, in that case, ruled that the positive canine alert gave the police "probable cause to search the vehicle . . ., . . . and all of the occupants.' "*Id.* at 841. On appeal, the Illinois Appellate Court agreed that the alert by a dog trained to detect contraband gave the police "probable cause to believe that controlled substances were somewhere *either* within the car *or* on the person of one or more of its occupants. . . . However, before [Officer] Gallagher searched defendant's person, he could have–and should have–had the dog sniff defendant to see if the dog would again alert." *Id.* at 842 (alteration added) (emphasis added). The Illinois Appellate Court went on to note that it has been held that a canine sniff is not a search for purposes of the Fourth Amendment, pursuant to *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), and opined:

> "If a dog sniff . . . had occurred and the dog alerted, then probable cause would have existed to search defendant's person. If, on the other hand, the dog did not alert after sniffing defendant but did alert as to one of the car's other occupants or as to the now-unoccupied car interior, then no basis would have existed to search defendant's person. By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in their power to do), the officers willfully denied themselves this

additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of 'willful ignorance.'

"This posture of 'willful ignorance' dissipates the reasonableness of the police conduct in this case, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car. In *Houghton* . . . the Supreme Court wrote of the 'unique, significantly heightened protection afforded against searches of one's person and quoted the following from *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1881-82, 20 L.Ed.2d 889, 908 (1968): ' "Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." ' "

Fondia, 251 Ill.Dec. 553, 740 N.E.2d at 842-43. *See also State v. Kelly,* 2001 WL 1561543 (Ohio App.2001) (ruling that a canine alert to the presence of drugs in a car gave police probable cause to search the interior of the car, but not to search the occupants of the car, one of which was the defendant, because the general canine alert was not specific to indicate that the defendant had drugs on his person).

c. Consideration of Probable Cause to Search Respondent

In the case *sub judice* and relying on our holdings in *Pringle, Collins, Livingston,* the Supreme Court's holding in *Di Re,* the Illinois case of *Fondia,* we hold that there was not probable cause to search respondent. This case is similar to the situation in *Fondia,* where the defendant was in a car that had had a positive drug alert by a drug detection dog and the officer then removed the defendant from the car, searched him, found drug paraphernalia and arrested him. We emphasize, just as the Illinois court in *Fondia* emphasized, that while the alert by a drug dog trained to detect contraband, undisputedly, gave the

police probable cause to believe there was contraband somewhere in the car or on the person of someone in the car, the canine sniff of the vehicle alone did not amount to probable cause to then search each of the passengers.

Without additional facts that would tend to establish respondent's knowledge and dominion or control over the contraband before his search, the K-9 sniff of the car was insufficient to establish probable cause for a search of a non-owner, non-driver for possession. Merely sitting in the backseat of a car did not amount, in this case, to probable cause specific to respondent to search and subsequently arrest him. If the K-9 had sniffed respondent, and specifically alerted to respondent, before the officer searched him, probable cause for the search might have existed. If the officers simply had Bosco sniff each of the passengers of the car prior to searching them, then probable cause might have existed to search any of the passengers who positively re-alerted the canine to contraband. This did not happen here.[6]

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[6] A certified drug detection dog is very accurate and minimally intrusive, much less so than a search because "Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security.' "*Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1881-82, 20 L.Ed.2d 889, 908 (1968). Also, a canine sniff, in and of itself, is not a search for purposes of the Fourth Amendment. *See United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110, 121 (1983). Therefore, a dog sniff of the passengers might have been appropriate after the K-9 alerting had established probable cause existed to search the vehicle. Under petitioner's reasoning, if contraband were found in a twelve-passenger van, or perhaps a bus, trolley, or taxi that you share with someone for means of public transportation, the police would be permitted to search everyone in that vehicle simply because a drug detection dog gave a positive general alert to contraband in that vehicle somewhere. Simply stated, a policy of permitting officers to search on this basis alone until contraband is found on someone, without other indications of particularized

Moreover, as the Court of Special Appeals in this case opined, some link between the passenger and the crime must exist or probable cause generally will not be found. That was the case here. Respondent was searched merely based upon the fact that probable cause existed to search the vehicle based upon a general canine scan of the car, nothing more. Without any other indicia of possession of contraband, specifically relating to respondent, there was no probable cause for the officer, at that point in time on the night in question, to have sufficient probable cause to search respondent. There simply was no link or further factual basis to connect respondent to drugs or to having committed any crime solely upon Bosco's positive scan of the vehicle owned and driven by another person.

In contrast with the cases previously discussed, petitioner asserts that the *dicta* intimated by this Court and the Court of Special Appeals in the cases of *Wilkes v. State,* 364 Md. 554, 587 n. 24, 774 A.2d 420, 439 n. 24 and *State v. Funkhouser,* 140 Md.App. 696, 782 A.2d 387 (2001) support a finding of probable cause to search not only the vehicle itself *but also* the passengers of a vehicle when there has been a positive alert by a drug detection dog to contraband somewhere in a vehicle. In *Wilkes,* in a footnote, this Court recognized that the cases from some jurisdictions have taken the position that a positive alert to contraband by a drug dog amounted to probable cause to effectuate a warrantless arrest. In *Funkhouser,* the Court of Special Appeals held that when a qualified drug dog signals to its handler that narcotics are in a vehicle there is *ipso facto* probable cause to justify a warrantless *Carroll* doctrine search of the vehicle. But, petitioner fails to recognize that searches of vehicles pursuant to a positive canine alert and probable cause to do so is well-settled and is distinguishable from the

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suspicion of contraband on that person, is, in our view, constitutionally unacceptable. *See Pringle, supra.*

issue raised in this case.[7]

Additionally, both *Wilkes* and *Funkhouser* are factually distinguishable because in both of those cases the person searched and arrested was the sole occupant of the car and the owner/driver of the car. In neither case was the person searched a mere passenger. In *Funkhouser,* the Court of Special Appeals stated "The police not only had probable cause [after a positive canine scan] to search the Jeep wrangler; they also had probable cause to arrest Funkhouser as its driver and lone occupant." (alteration added). Admittedly, we stated in *Wilkes* "that once a drug dog has alerted the trooper to the presence of illegal drugs in a vehicle, sufficient probable cause existed to support a warrantless arrest." 364 Md. at 554 n. 24, 774 A.2d at 439 n. 24. However, as in *Funkhouser,* Wilkes was the driver and the only person in the vehicle. Petitioner also asserts that the case of *United States v. Klinginsmith,* 25 F.3d 1507 (10th Cir.1994), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994), cited in *Wilkes,* supports the extension of probable cause to include passengers. Klinginsmith was a passenger in a car driven by another person. The police had placed a sign near the highway that read "Narcotic Check Lane Ahead," but the sign was a ruse hoping to get narcotics traffickers who saw the sign to exit the highway on a particular exit. When the driver of the car exited the highway, the police pursued the car and stopped it at a gas station. The troopers began asking questions of both of the occupants, including Klinginsmith, and both men consented when the troopers asked to search the car. In the meantime, a canine unit had arrived on the scene and gave a positive alert for narcotics in the car. The Tenth Circuit held that "when the dog 'alerted,' there was probable cause to arrest [the driver and passenger]." *Klinginsmith,* 25 F.3d at 1510. We also recognize that the U.S. District Court for the District of Kansas recently

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[7] *See* discussion in text *supra* regarding the *Carroll* doctrine.

reaffirmed the holding in *Klinginsmith* in *United States v. Garcia,* 52 F.Supp.2d 1239 (D.Kan.1999). Despite the holdings in *Klinginsmith* and *Garcia,* we hold that those cases are not controlling as to the issue currently for our review. Rather, we hold in line with the body of case law discussed *supra,* especially our very recent holding in *Pringle,* and affirm that a positive canine scan to a vehicle's interior compartment generally, without more, does not rise to probable cause to search all passengers of that vehicle.

A passenger in an automobile is generally not perceived to have the kind of control over the contents of the vehicle as does a driver and cases from this State have noted the distinction between drivers and owners and passengers of vehicles. Therefore, some additional substantive nexus between the passenger and the criminal conduct must appear to exist in order for an officer to have probable cause to either search or arrest a passenger.

Pursuant to the facts of the case *sub judice,* there was no link, beyond the positive canine alert to drugs in the car somewhere, between respondent and the drug scan by Bosco of the passenger compartment as a whole. At the time of the search of respondent, there was no evidence, other than Bosco's alert to the car in which respondent and four others had been sitting, to establish respondent's possible possession of drugs. There were no circumstances in this case indicating that there were drugs or drug paraphernalia visible to either the occupants of the car or the officers looking into the vehicle, there was no evidence of any odor of drugs emanating from the vehicle that would have been detectable to a passerby or even to a passenger, nor is there any evidence that any of the occupants prior to the search exhibited any suspicious behavior to the officers. We recognize that if, in a particular case, the facts justify it, there may be a constitutionally acceptable basis for searching the passengers, but that is not so under the facts of the case *sub judice.*

IV. Conclusion

As we have indicated we do not dispute that Bosco's positive alert provided evidence of a commission of a crime and that Bosco's alert, alone, provided adequate probable cause for the officers to search the automobile without a warrant. However, without anything more than the positive canine alert to drugs in the automobile somewhere, *i.e.*, something more particular linking any one passenger in the car, including respondent, to the drugs sniffed by Bosco, there was insufficient probable cause to search the passengers of the automobile in question in this case. A canine alert on the exterior of a vehicle does not support the proposition that the drugs potentially in the car are concealed on a *particular* occupant of that vehicle. When the police get all of the occupants out of the vehicle and find no drugs in the vehicle, they cannot use a positive general canine scan of the car as authority to go further and search a non-owner/non-driver passenger. In the case *sub judice,* the search of respondent on these facts was unlawful. The motion to suppress should have been granted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

Dissenting Opinion by HARRELL, J., in which BATTAGLIA, J., joins

Consonant with my association with the dissent in *Pringle v. State,* 370 Md. 525, 556-66, 805 A.2d 1016, 1033-40 (2002), I respectfully dissent in the present case. Although *Pringle* presaged the result in this case, I cling to a view that both it and this case are decided wrongly. In this case, I would adopt the reasoning of *United States v. Klinginsmith,* 25 F.3d 1507 (10th Circ.1994), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130

L.Ed.2d 602 (1994) and *United States v. Garcia,* 52 F.Supp.2d 1239 (D.Kan.1999) and reverse the Court of Special Appeals.

Judge BATTAGLIA authorizes me to state that she joins this dissent.

APPENDIX C

Court of Special Appeals of Maryland.

Earmon Alvin WALLACE, Sr.,
v.
STATE of Maryland.

No. 2395, Sept. Term, 2000.

Feb. 27, 2002.

Submitted before DAVIS, KENNEY, DEBORAH S. EYLER, JJ.

KENNEY, Judge.

Appellant, Earmon Alvin Wallace, Sr., was convicted at a bench trial on an agreed statement of facts in the Circuit Court for Anne Arundel County of possession with intent to distribute cocaine.[1] Appellant asks a single question on appeal:

> Did the trial court err in denying the motion to suppress the evidence seized from appellant?

We answer in the affirmative and reverse appellant's conviction.

Factual and Procedural Background

At the suppression hearing, the State called three Annapolis

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[1] He was sentenced by the court to twenty years imprisonment, all but five years suspended, to be served without the possibility of parole. He was also ordered to serve five years probation upon his release from prison.

City Police Officers: Jessica Hertik, Elizabeth Nelson, and Jonathan Supko. Officer Hertik testified that at approximately 3:00 a.m. on July 9, 2000, she was driving her marked police car eastbound on Forest Drive in Annapolis, Maryland. As she approached Hilltop Lane, a forty mile per hour road, she observed a four-door Buick driving at a high rate of speed in the opposite direction. She made a U-turn and accelerated to 90 m.p.h. to catch up to the Buick. In addition to speeding, Officer Hertick saw the vehicle run a red light. Officer Hertick then activated her emergency equipment and the Buick pulled over.

Officer Hertik stopped behind the vehicle and exited her car, approaching the driver's side of the Buick. Sitting inside the vehicle was the male driver, a male front seat passenger, and three back seat passengers, appellant and two women. Officer Hertik recognized appellant and two of the other passengers from a previous encounter, although she did not say how. She informed the driver that she had stopped the vehicle for speeding and not stopping at a traffic light. Officer Hertik requested the driver's license and car registration, and he complied.

When Officer Hertik walked back to her car, she met Officer Nelson, who was on duty with Bosco, her drug detection dog. Officer Hertik explained what had occurred and then proceeded to run a license check and write two tickets. In the meantime, other units had arrived on the scene, and these additional officers[2] watched the Buick while Bosco scanned the vehicle.[3]

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[2] It appears from the testimony that a total of six officers were at the scene.

[3] Officer Nelson and Bosco had worked together for three years. During that time, they had been through 200 hours of training for certification, in addition to 90 hours each year to maintain their certification.

Bosco made two positive alerts to the presence of drugs at the rear seam of the driver's side front door. Officer Nelson testified that, because of air currents in the vehicle, there is little correlation between where a canine alerts and where drugs are found in the vehicle.

Officer Nelson advised Officer Hertik, who was still in the process of writing tickets, that Bosco had "made a positive alert on the vehicle." While Officer Nelson placed Bosco in the back of her car, Officer Hertik approached the vehicle to speak with the driver. She informed the driver that she suspected that the vehicle contained drugs and asked the occupants to exit the vehicle so the police could search them.

The occupants were taken out of the car one at a time and searched while the others remained in the car. The other officers at the scene watched the occupants of the car while the searches were being conducted. Officer Supko testified that his actions were not a mere "frisk" or "pat down" but were intended to discover anything suspicious. Officer Supko searched the three males, beginning with the driver. The front seat passenger was searched next.

Officer Supko then searched appellant, who was sitting behind the front passenger seat. During the search "for anything apparent[,][w]eapons and what not[,]" Officer Supko felt a hard object near appellant's groin, which he said he knew was not a gun, knife, or other weapon. Officer Supko handcuffed appellant with his hands behind his back, told him he was "not under arrest at the time[,]" and walked him to a grassy area away from the road. Officer Supko stated that he had handcuffed appellant "just for my safety and his safety."

As they walked, appellant moved his hips in an apparent attempt to shake the object loose. When the officer searched appellant's groin area again, the object was gone. Officer Supko saw, however, something protruding from appellant's left pants leg, which turned out to be a clear plastic baggie containing several pieces of suspected cocaine. Appellant was placed under arrest.

The two females were searched after appellant. Officer Hertick searched one of them herself. Only after the occupants were searched did Officer Hertick search the vehicle. She found $1,155 in cash in someone's shorts in the front passenger seat, and a knife in a purse in the back seat. No drugs were found in the car.

Prior to trial, appellant moved to suppress the evidence found on his person. He argued that a canine alert to the presence of drugs in a car, without more, did not give the police probable cause to perform a warrantless search of a passenger. The suppression court disagreed and denied his motion. It is from that ruling that appellant appeals.

Standard of Review

When reviewing the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *Lee v. State,* 311 Md. 642, 648, 537 A.2d 235 (1988); *Aiken v. State,* 101 Md.App. 557, 563, 647 A.2d 1229 (1994), *cert. denied,* 337 Md. 89, 651 A.2d 854 (1995). We extend great deference to the fact finding of the suppression judge and accept the facts as found, unless clearly erroneous. *Riddick v. State,* 319 Md. 180, 183, 571 A.2d 1239 (1990); *Perkins v. State,* 83 Md.App. 341, 346-47, 574 A.2d 356 (1990). We review the evidence in the light most favorable to the prevailing party; in this case, the State. *Riddick,* 319 Md. at 183, 571 A.2d 1239. Nevertheless, we make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Jones v. State,* 111 Md.App. 456, 466, 681 A.2d 1190, *cert. denied,* 344 Md. 117, 685 A.2d 451 (1996) (*citing Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

DISCUSSION

Appellant argues that the police lacked probable cause to

search him based on case law that holds that probable cause to search a passenger of an automobile does not exist without some linkage to the commission of a crime. The State argues that the trial court properly denied appellant's motion to suppress, asserting that "the dog's behavior signaled the presence of drugs in the car generally. As such, the search of the occupants of the car was fully justified for Fourth Amendment purposes." This is an issue of first impression in Maryland.

A. The Court's Ruling

The motion court made the following ruling:

For the following reasons, the Court believes the search of the Defendant was lawful based on probable cause.

> The Court finds from the facts that the police officer had reasonable grounds and had probable cause to stop the vehicle because she observed the vehicle committing a traffic offense. *Pryor v. State,* 122 Md.App. 671 [716 A.2d 338], *cert. denied,* 352 Md. 312 [721 A.2d 990] (1998). Incidental to the stop it is the police officer's obligation to conduct a routine record check as to the validity of the driver's license and vehicle registration. *Munafo v. State,* 105 Md.App. 662 [660 A.2d 1068] (1995). See, also, *United State[s] v. Shabazz,* 993 F.2d 431 (5th Cir.1993). However, Maryland law demands that a motorist who is subjected to a traffic stop for a minor traffic violation "cannot be detained at the scene of the stop longer than it takes–or reasonably should take–to issue a citation for the traffic violation that the motorist committed." *Pryor,* at 674-675 [716 A.2d 338]. In this case, there is no issue that the Defendant was detained any longer than it would reasonably take to issue a citation. The testimony is clear that Officer Nelson arrived seconds after Officer Hertik stopped the vehicle. In fact, both officers met at the rear of the vehicle in which the Defendant was a passenger, spent ten seconds discussing the matter,

and then an additional 30 seconds for the officer to get the dog and walk it around the vehicle. Lastly, Hertik testified she had not even completed the first ticket when she was advised by Nelson that the dog had alerted on the vehicle.

The only novel issue to be discussed then, is whether probable cause existed for a search of the individuals in the vehicle. We know that when a canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless search of the vehicle. *Gadson v. State,* 341 Md. 1 [668 A.2d 22] (1995), *cert. denied,* [517 U.S. 1203] 116 S.Ct. 1704 [134 L.Ed.2d 803] (1996). *Accord United States v. Dovali-Avila,* 895 F.2d 206, 207 (5th Cir., 1990); *In Re Montrail M.,* 87 Md.App. [420,] 437 [589 A.2d 1318 (1991)]. What these cases do not address is the right of the police officer to search the passengers of the vehicle with nothing more than the canine alerting to the vehicle.

The Supreme Court, in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) indicated that, concerning a canine alert, "a positive result would have resulted in his justifiable arrest on probable cause." Page 1329. This was in reference to luggage which had been detained for a canine scan. In addition, the Court of Special Appeals in *Timmons v. State,* 114 Md.[App.] 410 [690 A.2d 530] (1997) at 416 [690 A.2d 530], seemed to agree that once the dog alerted, "there was probable cause to do anything."

Defendants cite *Livingston v. State of Maryland,* 317 Md. 408 [564 A.2d 414] (1989) as authority indicating there was no probable cause to search the passengers in the vehicle. In *Livingston* the court concluded that marijuana seeds located on the front floor of an automobile does not empower an officer with sufficient cause to believe that a back seat passenger has dominion and control over the contraband. Clearly, as the court pointed out, the Fourth Amendment of the United States Constitution guarantees the

"right of the people to be secure in their persons . . ." U.S. Constitution, Amendment 4. As pointed out in *Livingston,* the result of these protections is that the police ought to obtain a search warrant to conduct a valid search of an individual unless probable cause exists to do so at the scene.

Unlike *Livingston,* the Court believes the dog alerting to drugs in a confined space such as the interior of the '99 Buick coupled with expert testimony that the odor will linger even after these drugs are removed from the vehicle, is sufficient probable cause to search the vehicle and the occupants. (The search of the vehicle revealed no drugs or paraphernalia although money was found in the vehicle which the dog later, at the station, hit upon as having the odor of drugs). Probable cause existed to believe that a). drugs were in the car, and b). that each Defendant had either constructive or actual possession of same. It is the alert on the interior of the car with five passengers that distinguishes this case from *Livingston.*

The Court finds that individuals are clearly "clothed with constitutional protection against an unreasonable search or an unreasonable seizure." *Ybarra v. Illinois,* 100 S.Ct. 338, 444 U.S. 85, 342 [sic] [62 L.Ed.2d 238] (1979). However, even in *Ybarra,* the court indicated "not only was probable cause to search Ybarra absent at the time the warrant was issued, it was still absent when the police executed the warrant." Page 342. Unlike *Ybarra,* in this case the probable cause existed for the police officers to reasonably believe that drugs were in that vehicle or in the vehicle by being on the person of the occupants. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra,* at 342. In the case at bar, the appellate courts have previously stated that the canine scan is probable cause to search and/or seize. As a result, the seizure and the search of the Defendant was based on probable cause.

B. The Traffic Stop

Officer Hertik observed that the Buick was obviously speeding and saw it run a red light. The officer having observed the traffic violation, the traffic stop was clearly proper. *Pryor v. State,* 122 Md.App. 671, 679, 716 A.2d 338, *cert. denied,* 352 Md. 312, 721 A.2d 990 (1998) (citing *Goode v. State,* 41 Md.App. 623, 629-30, 398 A.2d 801 (1979)). "The intrusion permitted [in a traffic stop, however,] 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Snow v. State,* 84 Md.App. 243, 264, 578 A.2d 816 (1990) (quoting *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)).

Although Officer Hertik apparently recognized some of the car's occupants, including appellant, from unspecified prior dealings, she immediately began processing two traffic tickets. Officer Nelson, having arrived at the scene virtually simultaneously with Officer Hertik, took the opportunity to have Bosco sniff the outside of the car. This occurred contemporaneously with Officer Hertik's actions in processing the tickets, which she had not completed at the time Bosco alerted. Consequently, there was no undue delay. *See Wilkes v. State,* 364 Md. 554, 576-77, 774 A.2d 420 (2001); *Snow,* 84 Md.App. at 265, 578 A.2d 816.

A "dog sniff of a vehicle conducted during a lawful detention is not a 'search' within the meaning of the Fourth Amendment." *Gadson v. State,* 341 Md. 1, 8 n. 4, 668 A.2d 22 (1995), *cert. denied,* 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 803 (1996); *In re Montrail M.,* 87 Md.App. 420, 436-37, 589 A.2d 1318 (1991), *aff'd,* 325 Md. 527, 601 A.2d 1102 (1992). *See also United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). Accordingly, the actions taken by the officers up to and including the canine

sniff[4] of the Buick were proper. We next turn our attention to the actions that occurred after Bosco's positive alert to the car.

C. Search of Vehicle's Occupants

The State does not argue that the officers had the right to frisk and that, as a result of the frisk, the presence of contraband became readily apparent.[5] The State's argument in this case, rather, is that Bosco's positive alert provided the officers with probable cause to search appellant without a warrant.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment does not denounce all searches or seizures, however, but only those that are unreasonable. *See Carroll v. United States,* 267 U.S. 132, 147, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Wilkes,* 364 Md. at 570, 774 A.2d 420.

"[A] police officer is generally required to obtain a search warrant to conduct a valid search of an individual. Nevertheless, there are exceptions to this requirement[.]"

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[4] Even if a canine scan were considered a search, appellant, as a passenger, would not have standing to contest it. *Timmons v. State,* 114 Md.App. 410, 416, 690 A.2d 530 (1997).

[5] "[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Klauenberg v. State,* 355 Md. 528, 552, 735 A.2d 1061 (1999). Thus, we do not address these and other possible arguments which may have been available.

Livingston v. State, 317 Md. 408, 410, 564 A.2d 414 (1989). For example, a search incident to arrest does not require a warrant. *State v. Evans,* 352 Md. 496, 516, 723 A.2d 423, *cert. denied,* 528 U.S. 833, 120 S.Ct. 310, 145 L.Ed.2d 77 (1999) (citing *Illinois v. Rodriguez,* 497 U.S. 177, 185, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)). In addition, if contraband were in plain view on a person, a warrantless search could be conducted. *Livingston,* 317 Md. at 412, 564 A.2d 414. Valid consent is also an exception to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973); *Doering v. State,* 313 Md. 384, 401-02, 545 A.2d 1281 (1988). The State does not claim that any of these exceptions are applicable in this case.

> Of the firmly rooted exceptions to the warrant requirement, a search incident to lawful arrest is the only one that authorizes a full-blown search of a person for the purpose of discovering evidence. (The frisk component of a stop-and-frisk authorizes the pat-down of the clothing surface for the limited purpose of detecting the presence of a weapon.) Probable cause to believe that a person is carrying evidence does not justify a warrantless search of the person any more than probable cause to believe a home contains evidence justifies a warrantless search of a home. Only places or things enjoying a lesser expectation of privacy, such as automobiles, are vulnerable to probable-cause-based warrantless searches for the purpose of discovering and seizing evidence of crime.
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> That the police have probable cause for a lawful arrest of a person does not in and of itself justify a warrantless search of that person. The search must be incident to an arrest itself. It may not be incident merely to good cause to make an arrest.

State v. Funkhouser, 140 Md.App. 696, 724-25, 782 A.2d 387 (2001).

Accordingly, to substantiate a search of the passengers in the vehicle, Bosco's positive alert must have provided the police

with probable cause to arrest the occupants of the car, and they must have actually arrested the occupants. In this case, appellant was specifically advised that he was not under arrest, and the State does not argue that the police were conducting a *Terry* frisk.[6] It is undisputed that, until Bosco alerted to the car, there was no probable cause to search the car or to make any arrests. Although the presence of Officer Nelson and Bosco fortuitously allowed the police to conduct a valid canine scan, Officer Hertik did not appear to be suspicious of the presence of contraband, as she indicated by proceeding immediately to prepare the traffic tickets. On the other hand, once a drug detection dog alerted, the police had probable cause to search the interior physical parts of a vehicle. *Gadson,* 341 Md. at 8, 668 A.2d 22 (1995); *In re Montrail M.,* 87 Md.App. at 437, 589 A.2d 1318. *Place,* 462 U.S. 696, 103 S.Ct. 2637; *United States v. Lovell,* 849 F.2d 910, 913 (5th Cir.1988).

The police may detain the vehicle's occupants while the search is conducted, *Timmons v. State,* 114 Md.App. 410, 417, 690 A.2d 530 (1997), and pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the officers may ask questions to further the investigation, and they may frisk the vehicle's occupants if they suspect that one or more of them is armed with a weapon. *Pryor,* 122 Md.App. at 679, 716 A.2d 338 (quoting *Derricott v. State,* 327 Md. 582, 587, 611 A.2d 592 (1992)).[7]

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[6] Despite Officer Supko's contention that appellant was not under arrest, it might not have been unreasonable for appellant to believe that he was, in fact, under arrest. As indicated, however, the State does not argue that the canine scan creates the probable cause to arrest and that the search was incident to that lawful arrest. No one but appellant was arrested.

[7] Again, the State argues only probable cause to search and not that the search of appellant's person was allowable under *Terry.*

Both the Court of Appeals and this Court have implied in recent cases, albeit in *dicta,* that a drug dog's positive alert may give rise not only to the right to search a car but the right to arrest an occupant without a warrant. *Wilkes,* 364 Md. at 587 n. 24, 774 A.2d 420; *Funkhouser,* 140 Md.App. at 722, 782 A.2d 387. In both of these cases, however, the driver was the sole occupant of the car. Neither court has yet had the opportunity to address directly the issue of whether a positive canine alert alone can provide the police with probable cause to arrest a passenger in the vehicle and to conduct a search incident to that arrest.

D. Cases Relied on by the Motion Court

Before we discuss the case law in other jurisdictions, we will discuss the cases relied on by the trial court in denying the motion to suppress.

The court first cited *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, in support of the right to search passengers in this situation. We do not find this case persuasive because of the factual distinctions and the manner in which passengers are treated under Maryland law, which we discuss in more detail below. Royer was in Miami International Airport when a canine alerted to the presence of narcotics in his luggage. The Supreme Court held that "a positive result would have resulted in his justifiable arrest on probable cause." *Royer,* 460 U.S. at 506, 103 S.Ct. 1319. Royer was, of course, not a passenger in an automobile at the time of the dog sniff. Moreover, because he had been seen carrying the luggage, there was a direct connection between the luggage and Royer. In this case, the scent could not be traced to a particular individual in the car.

Timmons, 114 Md.App. 410, 690 A.2d 530, requires more discussion. Timmons was a passenger in a car that had been stopped for speeding. None of the three occupants in the car had a valid driver's license, all appeared "excessively nervous,"

and gave conflicting stories. One of the troopers decided to conduct a canine scan of the car, and the dog gave a positive alert. The troopers searched the car and uncovered an 1897 silver coin, which one of the troopers started to give to the other passenger, but which Timmons claimed as his. In addition, they found ammunition, a handgun, and a locked currency bag, which contained cocaine, six rare coins, and $80.00 in cash. The occupants of the car were then arrested.

The motion court below seized on language in *Timmons* quoting the Circuit Court for Cecil County, which, in denying appellant's motion to suppress, stated that once the dog alerted "'there was probable cause to do anything.'" *Timmons,* 114 Md.App. at 416, 690 A.2d 530. The motion court here interpreted our opinion as "seem[ing] to agree" with this statement by the Circuit Court for Cecil County. We said:

> Our independent constitutional appraisal of the record of the suppression hearing convinces us that the trial court's findings of fact were not clearly erroneous and that its conclusions of law, based on those findings, were correct. Trooper Nolan testified that he did not detain appellant until after the positive canine scan. The trooper indicated that, prior to the scan, he merely sought to determine whether appellant or the other passenger had a valid driver's license so that the car could be driven away. There was no suggestion that Nolan did anything more than request appellant's cooperation in that matter. Nor was there any suggestion that appellant's cooperation was not entirely voluntary. Although, for obvious safety reasons, appellant could not leave the scene, no seizure within the meaning of the Fourth Amendment took place prior to the scan.
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> There is no dispute that, **once the canine scan was conducted, Nolan had a reasonable articulable suspicion to detain appellant and the others and to search the vehicle.** *Cf. Gadson* [, *supra,*] and *Snow* [, *supra,*] (both explaining that a positive alert by a certified drug-sniffing canine is sufficient to establish probable cause to search).

> Nor is there any dispute that, **once the contraband was found inside the vehicle,** the trooper had probable cause to make the arrests.[8] *See generally Doering* [, *supra,*] ("The rule of probable cause is a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion"). As **appellant was properly detained when he claimed ownership of the 1897 silver dollar and stated that he was a coin collector, and was properly arrested when he requested the wallet and keys that were on the back seat, the trial court properly denied the motion to suppress.**

Timmons, 114 Md.App. at 417-18, 690 A.2d 530 (emphasis supplied). This language does not suggest that the positive canine alert alone gave probable cause to arrest Timmons. Rather, it justified the search of the car, and it was the fruits of that subsequent search that formed the basis for the lawful arrest of the occupants of the car. Timmons claimed various articles from inside the car, including his wallet, the coin, and some keys, although he later disclaimed ownership when one of the troopers realized that one of the keys opened up the currency bag.

The facts of *Timmons* are very different from the facts of this case. In *Timmons,* the officers found drugs inside the car **before** they touched the occupants of the vehicle. In fact, it does not appear as though the defendants in *Timmons* were even subjected to a *Terry* frisk prior to the search of the car. We believe the trial court reads *Timmons* too broadly.

D. Positive Canine Alert and Passenger Searches

A search disclosed four jurisdictions that have addressed the

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[8] All three occupants of the vehicle were arrested, but only the arrest and subsequent search of Timmons was at issue in the case.

issue of whether a positive canine alert in itself provides the police with probable cause to arrest passengers in an automobile. If a positive canine alert provides probable cause to effect a warrantless arrest, a search incident to that arrest is proper.[9]

1. Florida

In *Woodbury v. State,* 730 So.2d 354 (Fla.App.) (en banc), *review denied,* 743 So.2d 17 (Fla.1999), the car in which appellant Woodbury was a passenger was stopped, not for a traffic violation, but based on a description of the car given to police by the family of Linda Anderson, who they had reported as missing. Anderson's family described her car and indicated that she might have loaned it to someone in exchange for drugs, as she had done in the past. After stopping the car, the driver advised the police that it was, in fact, Anderson's car but that she had Anderson's authority to drive it.

One officer ran a check on the driver's license and the vehicle's temporary tags, while another conducted a canine scan of the car's exterior. The dog made a positive alert. "The occupants of the vehicle, including Woodbury, were searched and cocaine was found on Woodbury." *Woodbury,* 730 So.2d at 355. The court found that the

> officer acted reasonably in stopping the vehicle to determine if it belonged to Ms. Anderson and, if it did, to see if she was safe. The officer further had reason to check the driver's license of the driver once she acknowledged that the car belonged to Ms. Anderson, and also to check the tag. The canine search was conducted within a reasonable time after the vehicle was stopped and the "dog alert" justified the

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[9] Searches incident to arrest are deemed to be proper without further justification. *See, e.g., Carter v. State,* 367 Md. 447, 467, 788 A.2d 646 (2002) (and cases cited therein).

search of the vehicle.

Woodbury, 730 So.2d at 355.

With respect to Woodbury's argument that there was no reasonable suspicion to justify a search of his person, the majority found the issue to be unpreserved and, therefore, waived on appeal. *Woodbury,* 730 So.2d at 355. One of the concurring judges and the dissenting judge, however, opined that the positive dog sniff did not provide probable cause to search Woodbury.

In his concurring opinion, Judge Warren H. Cobb noted that there was no showing that the vehicle itself was searched. *Woodbury,* 730 So.2d at 355 (Cobb, J. concurring). Although Judge Cobb agreed that the issue was not preserved, he also stated that

> [t]he core question here should have been whether a dog alert on a vehicle, in and of itself, authorizes the arrest and search of all of the occupants of that vehicle. The answer is no. *See United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *Rogers v. State,* 586 So.2d 1148 (Fla. 2d DCA 1991).

Woodbury, 730 So.2d at 356. Both *Di Re* and *Rogers* concerned the ability of police officers to extend searches of automobiles to searches of passengers.[10]

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[10] *Rogers* did not address this specific issue, because a positive canine alert resulted in a search of the driver's van, not his person. The search uncovered contraband, which then provided probable cause to arrest the driver. After the driver's arrest, police searched the passenger's purse. She had previously denied consent to search her purse, but after the driver's arrest, she handed the purse over after a demand by a police officer. The passenger was not arrested at that point. The majority found that the search of her purse would be valid only "on the basis that the police officer had probable cause to arrest [the passenger] for actual or constructive possession of the cocaine found in the van." After reviewing the totality of the circumstances, the majority in *Rogers* found that the police lacked

Judge Cobb also provided the following "advice" to police faced with a situation like the one in *Woodbury:*

> Had the vehicle been searched, based on the dog alert, and drugs had been found therein, that may have supplied probable cause to arrest and search the person of one or more occupants, depending on the location of the drugs in the vehicle. But it would not have automatically authorized the police to arrest and search the persons of all of the occupants absent a further dog alert on the individual occupants. If no drugs had been found in the vehicle, none of the occupants would have been subject to arrest and search absent an individual dog alert on that occupant's person.

Woodbury, 730 So.2d at 355 n. 1.

Judge Charles M. Harris dissented from the opinion, stating that he believed the court should have reached the issue of whether the positive canine alert provided probable cause to search the passengers of the car, because Woodbury properly raised the issue below. *Woodbury,* 730 So.2d at 358 (Harris, J. dissenting). Judge Harris stated:

> In our case, the police stopped a vehicle which they believed belonged to one who they had been informed used illegal drugs. A canine alert on the vehicle should not have come as a surprise. The alert did not raise a reasonable suspicion that Woodbury, neither the owner nor the driver of the vehicle, was engaged in criminal activity. There should be some independent basis for searching the occupants of a vehicle, particularly a non-owner or non-driver of the vehicle, detained because of an exterior canine alert. Admittedly, I have found no direct authority on this point (for or against it), but logic suggests its validity. All drugs

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probable cause to suspect that the passenger was in constructive possession of the cocaine and that the search of her purse was illegal. *Rogers,* 586 So.2d at 1152. *Di Re* will be discussed later in the opinion.

concealed on an occupant of a vehicle must necessarily be located within the vehicle. However, even assuming the alert indicates the current, as opposed to past, presence of drugs, all drugs located within the vehicle would not necessarily be concealed on an occupant or any particular occupant. A canine alert on the exterior of the vehicle supports the general proposition that drugs may well be located within the vehicle, but not the more specific proposition that the drugs are concealed on a particular occupant thereof. . . .

If the facts justify it, there can be a constitutional basis for searching the passengers. There appears to be no reason why an independent canine sniff of the occupants themselves could not have been conducted during the vehicle search. The passengers have no expectation of privacy in the air space around them. If their body gives off an odor of illegal narcotics discernable by a trained dog during a period in which the occupants are not illegally detained, this appears to be their bad luck. As stated in *U.S. v. Morales-Zamora*, 914 F.2d 200, 204-05 (10th Cir.1990), in discussing two United States Supreme Court decisions:

> Together, [*United States v.*] *Jacobsen* [, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)] and *Place* [, *supra,*] make clear that there is no intrusion on legitimate privacy interests (and hence no "search") where the only information revealed [by a canine sniff] is limited to controlled items. *See U.S. v. Colyer,* 278 U.S.App.D.C. 367, 878 F.2d 469 at 474 [(1989)] (*Place* and *Jacobsen* stand for the proposition that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed).

The record before us does not reflect that the vehicle was searched. Indeed, the drugs that alerted the canine may well remain inside the door panel or under the seat of the vehicle. Nor does the record reflect an independent canine alert on the occupants before they were subjected to the search of

their person. They were searched only because they were "visitors" in a vehicle suspected of containing drugs.

Woodbury, 730 So.2d at 359 (footnote omitted).

Although Judge Harris may have found no authority for his decision, his remarks supported a similar conclusion reached by the Court of Appeals of Illinois.

2. Illinois

In *People v. Fondia*, 317 Ill.App.3d 966, 251 Ill.Dec. 553, 740 N.E.2d 839 (2000) (Cook, J., dissenting), Fondia had been a passenger in a car driven by Sharon Russell. Officers David Shaffer and Douglas Gallagher each spoke with Russell and the other passenger, Wayne Aikens, and then proceeded to "conduct computer inquiries and warrant checks" on all three of the car's occupants. Officer Shaffer also requested a canine unit.

The canine unit arrived approximately two minutes after being requested, and the dog gave a positive alert to the car. The occupants were ordered out of the car, and Officer Gallagher "informed [Fondia] that the dog had alerted and that Gallagher was going to search him. When [Fondia] responded that he did not want to be searched, Gallagher told him that he did not have the right to refuse." Gallagher found a metal tube that he believed to be a crack pipe, handcuffed Fondia, and completed the search. No contraband was found pursuant to searches of Russell and Aikens. *Fondia*, 251 Ill.Dec. 553, 740 N.E.2d at 841.

The majority held:

> The officers here knew that the dog had alerted to the car, thus providing them with probable cause to believe that controlled substances were somewhere either within the car or on the person of one or more of its occupants. After the officers ordered the occupants out of the car, Gallagher told defendant that he was going to search him and then placed his hand into defendant's left-front pocket. Gallagher felt a

metal tube and removed it. However, before Gallagher searched defendant's person, he could have–and should have–had the dog sniff defendant to see if the dog would again alert. See *United States v. Place,* [*supra,*] (a canine sniff is not a search for purposes of the fourth amendment).

If a dog sniff of defendant had occurred and the dog alerted, then probable cause would have existed to search defendant's person. If, on the other hand, the dog did not alert after sniffing defendant but did alert as to one of the car's other occupants or as to the now-unoccupied car interior, then no basis would have existed to search defendant's person. By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in their power to do), the officers willfully denied themselves this additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of "willful ignorance."

This posture of "willful ignorance" dissipates the reasonableness of the police conduct in this case, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car. In [*Wyoming v. Houghton,* 526 U.S. 295, 303, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)] the Supreme Court wrote of the "unique, significantly heightened protection afforded against searches of one's person" and quoted the following from *Terry v. Ohio,* [*supra,* 392 U.S. at 24-25, 88 S.Ct. 1868]: ""Even a limited search of the outer clothing * * * constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.""

We find support for our conclusion in the dissenting opinion in *Woodbury* [, *supra,*] (Harris, J., dissenting). . . . *Fondia,* 251 Ill.Dec. 553, 740 N.E.2d at 842-43.

In dissent, Justice Robert W. Cook stated that there was "no evidence in the record which indicates that a canine sniff of individuals is feasible, and the appellate prosecutor, during oral

argument, avowed that it was not, because the dog may be confused by body odors and proximity to a human being." *Fondia,* 251 Ill.Dec. 553, 740 N.E.2d at 844-45 (Cook, J., dissenting). Justice Cook also stated that "just as there was probable cause to believe there were drugs in the car, there was also probable cause to believe the three individuals in the car possessed drugs on their persons." *Id.*

3. Ohio

The Court of Appeals of Ohio recently considered this issue in *State v. Kelly,* 2001 WL 1561543, 2001 Ohio App. LEXIS 5444, slip opinion (Ct.App.Ohio Dec. 7, 2001) (Grendell, J. dissenting).[11] Kelly was one of two passengers in a car that was stopped for "failure to dim high beams" and an exhaust system violation. When Officer Dustin Svab approached the car, he became suspicious that the occupants were attempting to conceal something, because it appeared as though the female passenger had "placed her hand under her shirt." In addition, Officer Svab knew Kelly from an unspecified "prior police encounter."

When Officer Svab called in the traffic information, he requested a canine unit. He then began preparing a written warning. After the canine unit arrived, the dog gave a positive alert to the car. Officer Svab and Patrolman Mark Cooper, the canine handler, had the occupants get out of the car and patted them down. After performing an initial pat search of Kelly, Officer Svab asked if

> they could untie "the top of his boots to check the inside * * * because on a prior occasion [when Officer Svab] dealt with [appellee, he] had found a crack pipe in the rear of one of the cruisers immediately after [appellee] was released from the

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[11] Judge Diane V. Grendell dissented, but we have been unable to locate a copy of that dissent.

cruiser and [he] hadn't detected it when [appellee] went into the car." On that prior occasion, appellee's boot was not checked, so they checked it to make sure there was no knife or anything. Patrolman Cooper located a long slender gold glass tube, which was a crack pipe, and appellee was placed under arrest.

Kelly, at *1, 2001 Ohio App. LEXIS at *3-4.

In this case, unlike *Woodbury* and *Fondia, supra,* the motion court suppressed the evidence. The appellate court stated:

In the case *sub judice,* Officer Svab and Patrolman Cooper had probable cause to search the interior of the car once the canine alerted its handler to the presence of drugs. However, neither officer searched the interior of the car. Instead, they had the occupants exit the automobile and searched them. There was no claim the dog "indicated" that appellant had drugs on his person.

* * *

On the other hand, in the situation before us, Officer Svab testified that he felt that because of movement by the passengers in the auto, they might have been carrying a weapon. Therefore, he had all three occupants exit the vehicle. A pat down search was conducted on the driver and the female passenger, but nothing was found. After an initial pat down of appellee, the officers requested that he unlace his boots for a further search. Officer Svab testified that based on his prior experience with appellee, he suspected that appellee may have had a knife or other contraband in his boots. Following the arrest of appellee on a prior occasion, Officer Svab claimed that he found a crack pipe in his cruiser after taking appellee to the Ravenna Police Department for processing purposes. However, there is nothing in the record before us to establish that appellee was the individual who placed that contraband on the floor of Officer Svab's cruiser. Further, his prior experience only involved a suspicion of drug paraphernalia, not weapons. As

previously indicated, per *Terry,* the pat down could only initially address safety issues, not generally [sic] contraband issues.

Based on the initial pat down of appellee, the record does not demonstrate that anything was "immediately apparent" to either Officer Svab or Patrolman Cooper as contraband, and thus, its subsequent removal was not justified. It is our view that the officers searched appellee more thoroughly based solely on a prior experience Officer Svab had had with appellee. Thus, there were no "exigent circumstances" to justify conducting a further warrantless search of appellee's person.

Kelly, at *3-4, 2001 Ohio App. LEXIS at *8-11.

d. United States Court of Appeals for the Tenth Circuit

The Tenth Circuit, and the United States District Court for the District of Kansas, have held that a positive canine alert to a vehicle provides the police with probable cause to search the vehicle's passengers.

In *United States v. Klinginsmith,* 25 F.3d 1507 (10th Cir.1994), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994), appellant Klinginsmith was a passenger in a car driven by Fredrick Aldon Magee. The men were driving on I-35, a highway that runs in a northeasterly direction from Wichita, Kansas, to Kansas City, Kansas. State troopers had devised a scheme to try to catch narcotics traffickers. Outside Melvern, Kansas, they erected signs reading "NARCOTIC CHECK LANE AHEAD." The sign was a ruse, but police hoped that, if narcotics traffickers saw the sign, they would exit the highway at a particular exit.

When Magee exited the highway, troopers pursued his car. Magee eventually stopped the car in a gas station, and Troopers Simone and Heady asked questions of both Magee and Klinginsmith. The two gave divergent stories as to where they had come from and where they were going. Both consented to

a search of the car. In the meantime, a canine unit arrived on the scene, and, before any search was undertaken, Magee's car was scanned, the dog making a positive alert. "At this point, the officers handcuffed Magee and Klinginsmith [,]" and the troopers eventually located a large amount of marijuana in the trunk of the car.

The Tenth Circuit held that "when the dog 'alerted,' there was probable cause to arrest Magee and Klinginsmith and to search the vehicle without a warrant under the automobile exception even had there been no prior consent." *Klinginsmith,* 25 F.3d at 1510 (citing *United States v. Stone,* 866 F.2d 359, 364 (10th Cir.1989)).

Stone, the case relied on by the Tenth Circuit, concerned a traffic stop of Stone's car with apparently two passengers in the car. In that case, unlike *Klinginsmith,* the positive canine alert led to a search of the car, rather than to a search of the occupants. *Stone,* 866 F.2d at 361, 364.

In a more recent decision, the U.S. District Court for the District of Kansas, relying on circuit precedent, reaffirmed the holding in *Klinginsmith. United States v. Garcia,* 52 F.Supp.2d 1239, 1253 (D.Kan.1999). *Garcia* was a case in which the driver was arrested after a positive canine alert:

> Even in the absence of the other information known by the troopers, once the drug dog alerted on the two vehicles, the troopers had probable cause to arrest Garcia and the other occupants of the two vehicles.[12] *See United States v. Shayesteh,* 166 F.3d 349 (10th Cir.1998) ("An alert by a certified narcotics sniffing dog provides probable cause for a search and arrest.") (citing *United States v. Williams,* 726 F.2d 661, 663 (10th Cir.), *cert. denied,* 467 U.S. 1245, 104

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[12] Garcia was driving a Toyota Tercel and was traveling with a white minivan in a sort of caravan. It is unclear from the facts whether Garcia was alone in the Tercel, although it is clear that the van had passengers.

S.Ct. 3523, 82 L.Ed.2d 830 (1984)), *cert. denied,* 526 U.S. 1045, 119 S.Ct. 1347, 143 L.Ed.2d 510 (1999).

Garcia, 52 F.Supp.2d at 1253. *Shayesteh* involved a case in which the driver was the sole occupant of the car. *Williams* was a luggage case more similar to *Royer* than to automobile cases.

E. Distinction Between Drivers and Passengers

In addition to looking at the case law in our sister states and in the federal courts, we recognize a distinction between the drivers of automobiles and passengers in the car. This distinction was first set out in *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

Di Re is not a canine alert case but it has influenced the discussion in such cases. In *Di Re,* an informant told the investigating officer that he was to buy counterfeit gasoline rations from a person named Buitta at a certain place and time. The officer followed Buitta's car to the appointed place, where it stopped. When the officer approached the car, he found Buitta in the driver's seat, the informant in the back seat, and another man, Di Re, in the front passenger seat. The informant held two counterfeit gasoline ration coupons in his hand. The three men were arrested and transported to a police station for questioning. After being questioned, Di Re was searched and the police recovered one hundred counterfeit coupons on his person.

Before the Supreme Court, the government argued, among other things, that the search of the car was justified because the police reasonably believed that the car carried contraband, and therefore, the search of Di Re's person was justified. The government relied on the *Carroll* doctrine, named after *Carroll v. United States,* 267 U.S. 132, 153, 155-56, 45 S.Ct. 280, 69 L.Ed. 543 (1925), which provides an exception to the warrant requirement for searches of automobiles so long as there is probable cause that the vehicle contains contraband.

The *Carroll* doctrine is grounded in the exigency of searching an automobile, which can be easily moved out of the jurisdiction, without obtaining a warrant. *Id.* No additional exigency must be shown for a warrantless search of an automobile once probable cause that the vehicle contains contraband is established. *Maryland v. Dyson,* 527 U.S. 465, 466-67, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (citing *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). The *Di Re* Court rejected the government's argument because there was no evidence that the car was searched. The Court then went on to state, in *dicta:*

> We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

Di Re, 332 U.S. at 587, 68 S.Ct. 222.

The Court went on to remark:

> The argument that one who "accompanies a criminal to a crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

Di Re, 332 U.S. at 593, 68 S.Ct. 222.

The Court finally concluded:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made,

> law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them.

Di Re, 332 U.S. at 595, 68 S.Ct. 222.

The Court of Appeals has long recognized that there must be some basis for a suspicion that a suspect is engaging in criminal behavior. *Sugarman v. State,* 173 Md. 52, 195 A. 324 (1937). Sugarman had been arrested for disorderly conduct[13] and placed in a holding cell after he was searched. When the cell was searched after Sugarman's departure, the police found papers indicating that Sugarman was involved in an illegal lottery operation. The Court of Appeals held, however, that, although the cell had been cleaned out prior to Sugarman's arrival, the officer who had searched Sugarman prior to placing him in his cell had not found the papers on his person. Because the "record is devoid of testimony tending to show any possible connection between the prisoner and the pieces of cardboard found in the crack of the cell bench," the Court held that the evidence should have been suppressed. *Sugarman,* 173 Md. at 58-59, 195 A. 324.

The Court of Appeals first cited *Sugarman* in conjunction with *Di Re* for this same proposition, that there must be a nexus

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[13] The Court of Appeals had many problems with Sugarman's arrest, since his arrest initially proceeded from a "hunch" by a police officer that Sugarman was engaged in wrongdoing. The officer demanded that Sugarman accompany him to the station. Sugarman attempted to bribe the officer and, at some point, fled from him. The Court found that the officer was not lawfully performing his duties, and that the officer's behavior tainted the entire subsequent contact with Sugarman.

between suspicion of criminal behavior and a defendant, in *Hayette v. State,* 199 Md. 140, 144, 85 A.2d 790 (1952). This Court cited *Di Re* in this same context in *Baziz v. State,* 93 Md.App. 285, 297, 612 A.2d 296 (1992), *cert. denied,* 329 Md. 110, 617 A.2d 1056 (1993), in noting that "mere physical proximity to a crime cannot support a finding of probable cause."

In a specific application of this principle, the Court of Appeals first distinguished between passengers and drivers of automobiles in reviewing a case involving a police officer's automatic assumption that all of the occupants of a vehicle were guilty of wrong doing as the result of the presence of contraband in the car. *Livingston, supra,* 317 Md. 408, 564 A.2d 414. Livingston was a passenger in the backseat of a car that was stopped for speeding. State Trooper Lawrence Nelson detected two marijuana seeds on the right front floorboard of the car. All of the vehicle's occupants were arrested, and Trooper Nelson subsequently found cocaine and marijuana in Livingston's pocket. Livingston, having unsuccessfully moved to suppress this evidence, was eventually convicted.

The Court of Appeals held that the stop was valid and that the marijuana seeds were located as the result of a plain view search, which provided the trooper with probable cause to believe that a misdemeanor was being committed. *Livingston,* 317 Md. at 413, 564 A.2d 414. The Court found, however, that this did not automatically translate into a finding of constructive possession by Livingston, who was a passenger in the back seat of the car: "Merely sitting in the backseat of the vehicle, Livingston did not demonstrate to the officer that he possessed any knowledge of, and, hence, any restraining or directing influence over two marijuana seeds located on the floor in the front of the car." *Livingston,* 317 Md. at 415-16, 564 A.2d 414 (footnote omitted) (citing *Di Re,* 332 U.S. at 587, 68 S.Ct. 222).

The Court of Appeals, in the context of a challenge to the sufficiency of the evidence, discussed *Livingston* in *White v.*

State, 363 Md. 150, 767 A.2d 855 (2001). White was the passenger in a car driven by Kendrick Charity. The car was stopped and, eventually, searched. The officer found a box of pots and pans in the trunk, and, when he opened the box, he found a large quantity of cocaine. Both occupants of the vehicle were arrested.

The Court of Appeals, after examining *Livingston,* held that "the circumstantial evidence upon which the State's case rested was insufficient as a matter of law to support, beyond a reasonable doubt, that Petitioner exercised dominion or control over the cocaine found inside the pots and pans box in the trunk of Charity's automobile." *White,* 363 Md. at 166-67, 767 A.2d 855. The Court of Appeals recognized that there was, at most, some cause for suspicion, but that, ultimately, the presence of the cocaine in the trunk was simply insufficient to link White to it.

In a recent case, this Court has likewise recognized the distinction between passengers and drivers and the difference in control over the contents of a vehicle that each has. *Johnson v. State,* 142 Md.App. 172, 788 A.2d 678 (2002). In that case, Johnson was a passenger in a car that was stopped because it matched the description of a car provided in a broadcast of a possible car theft. The officer who stopped the vehicle confirmed that the tag number matched the number from the broadcast, and when he approached the car, he smelled marijuana. Through the vehicle's window, he saw what he believed to be marijuana on the gear shift between the driver and the front seat passenger, appellant. Both denied knowledge of the marijuana, but both were arrested. Additional marijuana was later recovered from the car's ashtray. In addition, police found a glycine bag containing what turned out to be 1.5 grams of crack cocaine pursuant to a search of appellant that took place at the police station.

Appellant moved to suppress the evidence, arguing that there was no probable cause for his arrest. We stated:

Here, [Officer] Trams not only smelled burnt marijuana,

> but he also saw a marijuana bud in plain view. We find that Trams had probable cause to believe that a crime was being committed in his presence. The issue, however, is not quite that elementary. Johnson's argument is premised upon the notion that Trams had no probable cause pertaining to *him*–the passenger of the vehicle. Even if there was probable cause pertaining to the driver, who was operating and "controlling" the vehicle, it may not necessarily follow that there was probable cause to believe that the passenger was involved in whatever crime that may have been committed by the driver. Accordingly, having determined that probable cause existed as to the driver in this case, we must nonetheless continue with our analysis of probable cause to determine if it existed as to appellant as well.

Johnson, 142 Md.App. at 188, 788 A.2d 678.

We then proceeded to analyze the case in light of *Livingston* and held that there was some factual basis to believe that Johnson was a participant in criminal activity. That analysis relied heavily on Office Trams' testimony of an overwhelming scent of marijuana as well as the fact that the marijuana was in plain view and equally accessible to both the driver and appellant. *Id.,* 142 Md.App. at 194-95, 788 A.2d 678.

Accordingly, as in all cases involving warrantless searches and arrests, a court has to analyze the issue of probable cause from a totality of the circumstances. A passenger in a vehicle generally is not perceived to have the kind of control over the contents of the vehicle as does a driver. Therefore, there must be some link between the passenger and the criminal conduct in order to provide probable cause to either search or arrest the passenger.

F. CONCLUSION

Recognizing conflict in the decisions in this area as well as prior Maryland case law on passengers, we are persuaded by the decisions holding that a canine alert to a vehicle, without

more, does not establish probable cause to arrest the passengers in the vehicle.

We note that the Court of Appeals made the following statement in *Wilkes,* 364 Md. at 587 n. 4, 774 A.2d 420:

> Moreover, some jurisdictions have held that once a drug dog has alerted the trooper to the presence of illegal drugs in a vehicle, sufficient probable cause existed to support a warrantless arrest. *See United States v. Klinginsmith,* 25 F.3d 1507, 1510 (10th Cir.) ("When the dog 'alerted,' there was probable cause to arrest [defendants] . . . ."), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994); *United States v. Williams,* 726 F.2d 661, 663 (10th Cir.1984) ("[A] drug sniffing dog's detection of contraband in luggage 'itself establishes probable cause, enough for the arrest, more than enough for the stop.'" (alteration in original) quoting *United States v. Waltzer,* 682 F.2d 370, 372 (2d Cir.1982), *cert. denied,* 463 U.S. 1210, 103 S.Ct. 3543, 77 L.Ed.2d 1392 (1983)).

Wilkes involved a canine scan in a case where the sole occupant of the vehicle was the driver, and we do not believe that the Court of Appeals intended this *dicta,* notwithstanding the citation of *Klinginsmith,* to encompass a ruling on cases such as the one at bar, where passengers are searched as the result of a positive canine alert.[14] Both *Williams* and *Waltzer* concern luggage cases, which, as explained above in connection with *Royer,* we have found to be factually distinct from automobile cases.

Moreover, in coming to the conclusion that a positive canine search provides probable cause not only to search the car but to

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[14] *Cf. Funkhouser,* 140 Md.App. at 722-23, 782 A.2d 387, speculating that the Court of Appeals cited "with implicit approval" to *Klinginsmith* and noting that *Klinginsmith* stands for the proposition that a positive canine scan may provide probable cause to arrest a driver and the occupants of the vehicle.

arrest everyone in it, the Tenth Circuit bases its decision on distinguishable cases. We also believe that it ignores the need to show a link between passengers of a car and suspicion of wrongdoing, as explained in *Di Re, supra,* and our own cases.

In this case, there was evidence of the commission of a crime when Bosco gave a positive alert to the Buick. This alert permitted a search of the vehicle, but, without anything more particular to link any one passenger in the car, including appellant, to the drugs smelled by Bosco, the search of each individual passenger absent an arrest based upon probable cause was improper.

JUDGMENT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

APPENDIX D

STATE OF MARYLAND	* IN THE
	*
	* CIRCUIT COURT
	*
v.	* FOR
	*
	* ANNE ARUNDEL COUNTY
EARMON ALVIN	*
WALLACE, SR.	* CRIMINAL NO. K-99-1173
	*

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MEMORANDUM OPINION AND ORDER

The facts in this case are undisputed. It appears that Officer Hertik, a two-year veteran of the Annapolis Police Department, on the midnight shift on July 9, 1999, was proceeding eastbound on Forest Drive at approximately 3:00 a.m. She noticed a vehicle proceeding at a high rate of speed heading westbound on Forest Drive and she immediately turned her vehicle around and sped up to catch the speeding vehicle. She indicated the speed limit was 40 miles per hour on Forest Drive, in Anne Arundel County, Maryland.

She claims she was exceeding 90 miles per hour in attempts to get behind this vehicle and she observed the vehicle go through the red light without stopping on Forest Drive and Bywater Road. She then caught up with the vehicle, putting on her emergency equipment and stopping the vehicle in the slow lane of Route 665. In the vehicle she noted five people, recognizing three of them.

She approached the vehicle and requested the driver's identification and registration. As she proceeded back to her vehicle with the license and registration Officer Nelson arrived at the scene, seconds prior to Officer Hertik receiving the license and identification. Officer Nelson had heard the call

over the radio and came as back up. Officer Nelson is a canine officer who walked up to Officer Hertik as Hertik was walking back to her vehicle. Hertik indicated she recognized three of the five people in the vehicle and that she asked Nelson to have Nelson's dog do a scan. This whole conversation took a matter of seconds. Hertik indicated she went back to her car to write up the tickets and to call in the information and did not see Nelson, who at the time had retrieved her dog and was walking around the vehicle with the dog alerting on the driver's door area and the driver's side rear passenger door area of the 1999 Buick automobile. Hertik advised she had almost completed one of the tickets when Officer Nelson advised her the dog had reacted positively to drugs in the vehicle. Hertik indicated she did not in any way deviate from the norm for writing the violation tickets. At this time, other police officers arrived and a search of the individuals began.

It appears the driver was first removed from the vehicle and searched. Next was the front seat passenger who was removed and searched. The third was the Defendant, who was seated in the rear seat behind the passenger, and then the two remaining persons were removed and searched. After a search of all the individuals the vehicle was searched. In the vehicle was found approximately $1,155.00 and a knife found in one of the female passengers' pocketbook. On the Defendant was found the controlled dangerous substance.

Without any cross examination or objection, Officer Nelson testified as to her years of service with the Annapolis Police Department as well as her four years in the canine section. She has been with the same dog for approximately three years and went through 200 hours of canine training and then 90 hours per year to keep certified. This same hourly certification applied to her dog. She indicated as to how her dog would scan and how the dog would react when it scented cocaine, marijuana, heroin, or methamphetamine. She also indicated there are times when the dog will alert and no drugs will be found. She further indicated that if drugs were on an

individual, or seeds or paraphernalia or residue, a residual odor will remain in the vehicle when that individual exits the car.

Most importantly, she testified as to the air currents and why nothing can be gleaned from where on the outside of the car the dog alerts because air is constantly moving within a vehicle, and that a newer vehicle will be more airtight, allowing less air out at certain areas where an older vehicle will allow the odors to permeate the outside air from all over the vehicle.

Police Officer Supko, who searched the Defendant, testified he was standing behind the Defendant when he patted the Defendant down. He felt an object in the front part of the Defendant's pants. He viewed it quickly and then moved in front of the Defendant to retrieve the item, first handcuffing the Defendant for the police officer's own protection. Supko testified as to the factors he considered in handcuffing the Defendant, it was 3:00 a.m., two of the other male passengers were in close proximity of the Defendant and they were not restrained. He then moved the Defendant off the street, over the curb and onto the grassy area for the protection and safety of the Defendant. While walking, the Defendant was making furtive motions which were obviously done so the drugs on his person, in his pants, would drop down the leg and onto the street. The bag of drugs did, in fact, go down the Defendant's leg but did not exit the bottom of the pants leg.

The State argues the police officers had probable cause to search the Defendant based solely on the alert by the expert, i.e., the scanning dog. The Defendant argues probable cause does not exist to effectuate a search and that the integrity of the Defendant's person cannot be violated without a warrant.

For the following reasons, the Court believes the search of the Defendant was lawful based on probable cause.

The Court finds from the facts that the police officer had reasonable grounds and had probable cause to stop the vehicle because she observed the vehicle committing a traffic offense. Pryor v. State, 122 Md. App. 671, cert. denied, 352 Md. 312 (1998). Incidental to the stop it is the police officer's

obligation to conduct a routine record check as to the validity of the driver's license and vehicle registration. Munafo v. State, 105 Md. App. 662 (1995). See, also, United State v. Shabazz, 993 F.2d 431 (5th Cir. 1993). However, Maryland law demands that a motorist who is subjected to a traffic stop for a minor traffic violation "cannot be detained at the scene of the stop longer than it takes - or reasonably should take - to issue a citation for the traffic violation that the motorist committed." Pryor, at 674-675. In this case, there is no issue that the Defendant was detained any longer than it would reasonably take to issue a citation. The testimony is clear that Officer Nelson arrived seconds after Officer Hertik stopped the vehicle. In fact, both officers met at the rear of the vehicle in which the Defendant was a passenger, spent ten seconds discussing the matter, and then an additional 30 seconds for the officer to get the dog and walk it around the vehicle. Lastly, Hertik testified she had not even completed the first ticket when she was advised by Nelson that the dog had alerted on the vehicle.

The only novel issue to be discussed then, is whether probable cause existed for a search of the individuals in the vehicle. We know that when a canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless search of the vehicle. Gadson v. State, 341 Md. 1 (1995), cert. denied, 116 S. Ct. 1704 (1996). Accord United States v. Dovali-Avila, 895 F.2d 206, 207 (5th Cir., 1990); In Re Montrail M., 87 Md. App. 437. What these cases do not address is the right of the police officer to search the passengers of the vehicle with nothing more than the canine alerting to the vehicle.

The Supreme Court, in Florida v. Royer, 103 S. Ct. 1319, 460 U.S. 491, 75 L. Ed. 2d 229 (1983) indicated that, concerning a canine alert, "a positive result would have resulted in his justifiable arrest on probable cause." Page 1329. This was in reference to luggage which had been detained for a canine scan. In addition, the Court of Special Appeals in

Timmons v. State, 114 Md. App. 410 (1997) at 416, seemed to agree that once the dog alerted, "there was probable cause to do anything."

Defendants cite Livingston v. State of Maryland, 317 Md. 408 (1989) as authority indicating there was no probable cause to search the passengers in the vehicle. In Livingston the court concluded that marijuana seeds located on the front floor of an automobile does not empower an officer with sufficient cause to believe that a back seat passenger has dominion and control over the contraband. Clearly, as the court pointed out, the Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons. . ." U.S. Constitution, Amendment 4. As pointed out in Livingston, the result of these protections is that the police ought to obtain a search warrant to conduct a valid search of an individual unless probable cause exists to do so at the scene.

Unlike Livingston, the Court believes the dog alerting to drugs in a confined space such as the interior of the '99 Buick coupled with expert testimony that the odor will linger even after these drugs are removed from the vehicle, is sufficient probable cause to search the vehicle and the occupants. (The search of the vehicle revealed no drugs or paraphernalia although money was found in the vehicle which the dog later, at the station, hit upon as having the odor of drugs). Probable cause existed to believe that a). drugs were in the car, and b). that each Defendant had either constructive or actual possession of same. It is the alert on the interior of the car with five passengers that distinguishes this case from Livingston.

The Court finds that individuals are clearly "clothed with constitutional protection against an unreasonable search or an unreasonable seizure." Ybarra v. Illinois, 100 S. Ct. 338, 444 U.S. 85, 342 (1979). However, even in Ybarra, the court indicated "not only was probable cause to search Ybarra absent at the time the warrant was issued, it was still absent when the police executed the warrant." Page 342. Unlike Ybarra, in this case the probable cause existed for the police officers to

reasonably believe that drugs were in that vehicle or in the vehicle by being on the person of the occupants. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." Ybarra, at 342. In the case at bar, the appellate courts have previously stated that the canine scan is probable cause to search and/or seize. As a result, the seizure and the search of the Defendant was based on probable cause.

For the above-stated reasons, the Court finds the search of the Defendant was based on probable cause; hence, the Motion to Suppress will be denied.

/s/ Joseph P. Manck
Joseph P. Manck, Judge

Dated: 3 day of February, 2000.

Copies to:

William Davis, Esquire
M. Virginia Miles, Esquire

ORIGINAL (2)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,	*	
Petitioner	*	
v.	*	No. 02-1649
EARMON ALVIN WALLACE, SR.,	*	
Respondent	*	

* * * * * * * * * * * * * * *

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Earmon Alvin Wallace, Sr., who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to proceed in *forma pauperis* pursuant to Rule 39.

Respondent's affidavit in support of this motion is attached.

Respectfully submitted,

Bradford C. Peabody

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND, *

Petitioner *

v. * **No.** 02-1649

EARMON ALVIN WALLACE, SR., *

Respondent *

* * * * * * * * * * * * * *

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Earmon Alvin Wallace, Sr., being duly sworn, depose and say that I am the respondent in the above-entitled case. I swear or affirm under the penalty of perjury that, because of my poverty, I cannot pay the costs of this appeal. I further swear or affirm under the penalty of perjury that my answers to this form are true and correct.

Signed: Earmon Alvin Wallace Sr. Date: 4-10-02

1. Are you presently employed?

Yes

(a) If the answer is *yes*, state the amount of your salary or wages per month and give the name and address of your employer.

TSI $350 month Mental Station Hampstead, MD

(b) If the answer is *no*, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

n/a

(a) If the answer is *yes*, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

n/a

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

N

(a) If the answer is *yes*, describe the property and state its approximate value.

5. List the persons who are dependent on you for support and state your relationship to those persons.

6. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? If yes, describe.

N/A

7. Have you paid -- or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? If yes, how much?

N/A

8. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? If yes, how much?

N/A

9. State your address of legal residence.

1624 Hilltop Creek Dr

London, Ky 40741

Your daytime phone number: 423 877-3555

Your age: 35 Your years of schooling: 11 years

Your social security number: 216 84 5153

NO. 02-1649

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

STATE OF MARYLAND,

Petitioner

v.

EARMON ALVIN WALLACE, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 02-1649

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

STATE OF MARYLAND,

Petitioner

v.

EARMON ALVIN WALLACE, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Review is unwarranted, because the opinions of the lower appellate courts correctly applied this Court's decision in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) to the particular facts of this case.

The Petitioner State merely relies on *dicta* in two cases for the proposition that there is a "conflict in the lower courts." (Pet. App. at 6). There is no such conflict.

STATEMENT OF THE CASE

At the suppression hearing, the State's witnesses testified to the following chain of events, in the early morning of July 9, 1999 in Annapolis, Maryland.

At about 3:00 a.m., Annapolis City Police Officer Jessica Hertik was in uniform, driving her marked patrol car on Forest Drive, when a car passed her "at a very high rate of speed," in the opposite direction. The speed limit was forty miles per hour.

Officer Hertik followed the car, at 90 miles per hour, and stopped it, after it went through a red traffic signal.

There were five occupants of the car, three males and two females. Respondent Wallace was in the rear seat, behind the passenger. Officer Hertik recognized three occupants, including Respondent. As Hertik was getting ready to write two traffic tickets and run a check on the driver's license, Officer Elizabeth Nelson arrived on the scene, with her K-9 dog. Officer Hertik told Officer Nelson of her "history with the occupants" whom she knew, and asked if Nelson would have her dog "scan the car."

Officer Nelson was a certified handler in the detection of drugs, and her dog was also certified proficient in drug detection. The dog was trained to swing his head back, scratch at the source of the drug and then sit. She testified that the odor of drugs lingers on paper money, and that her dog sometimes alerts to a single bill. If any type of drug is "smoked in the car," the odor is "going to stay in the car's upholstery for a good length of time." In this case, the dog "gave an alert" at both seams of the front, driver's side door. At no other point, "the rest of the way around the vehicle," did the K-9 give another alert.

Before Officer Hertik finished writing the traffic tickets, she was informed by Officer Nelson "that her dog had made a positive alert on the vehicle." Officer Hertik informed the driver "the dog hit on the car," meaning "[t]here is possibly CDS in the vehicle, and we would ask the occupants to exit one at a time so they would be searched."

One at a time, the occupants were removed from the car. The driver was "searched," first. Next, the front passenger was ordered out of the car. He said he could not get out, because he had taken his pants off. In the pocket of the front passenger's shorts, police found $1,155 in U.S. currency.[1] In the purse of a female occupant of the back seat, a knife was found.

The third occupant "searched" was Respondent. Respondent was in the right, rear passenger seat. Officer Jonathan Supko performed a "search" of Respondent. He performed a "search" of Respondent's outer clothing "for anything apparent, weapons, whatnot." Inside Respondent's pants in the groin area, the officer felt a large, hard, "balled up" object, which he said he knew was not a gun, knife, or other weapon. The officer handcuffed Respondent, "for safety purposes," after telling him he was "not under arrest." Officer Supko moved Respondent to a grassy area. Respondent seemed to be moving his hips back and forth. When he searched Respondent, again, the officer found the object had fallen down Respondent's pants leg to the cuff.

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[1] Later, after the money and arrestees were seized and taken to the police station, the K-9 "alerted to the money."

The object turned out to be a clear plastic sandwich baggie containing pieces of rock cocaine. At that point, Respondent was arrested.

At the suppression hearing, Respondent Wallace's trial counsel argued: (1) that, "The dog alerting to the car," does not "give you probable cause to search everybody in the car"; (2) that, while there was testimony of some prior contact between Respondent and Officer Hertik, there was no mention of "what that prior contact was or when it was"; (3) that, "there was no probable cause to search" Respondent; (4) that "They didn't search the car," when the dog alerted on the car, but Officer Hertik "made a decision that the occupants were going to be searched"; (5) that, if this search was legal, it would also be legal, for example, to search defense counsel and other occupants of a public trolley car, on their way to work, if a K-9 alerted to the car; (6) that this case involves not merely the search of a car but the occupants' "'bodily integrity,'" which is far more "'intrusive'"; and (7) that the search was unreasonable under the Fourth Amendment and the Court of Appeals of Maryland's decision in *Livingston*.[2]

The trial court denied the motion with a written memorandum opinion, filed on February 4, 2000. Respondent was later convicted of possession with intent to distribute cocaine.

On appeal to the Court of Special Appeals of Maryland, Respondent Wallace argued that this was no mere "frisk" or "pat down" but a full-blown "search ... for anything apparent, weapons, whatnot," as the officer admitted. This was done "without probable

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[2] *Livingston v. State*, 317 Md. 408, 564 A.2d 414 (1989).

cause" to believe that the right rear passenger was aware of, or participating in, any crime.

In the Court of Special Appeals, the State "argue[d] only probable cause to search and not that the search of appellant's person was allowable under *Terry*." (Pet. App. at 35a).

A three-judge panel of the Court of Special Appeals unanimously ruled that "a canine alert to a vehicle, without more, does not establish probable cause to arrest the passengers in the vehicle." (Pet. App. at 54a-55a). That court opined that in *United States v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994) (containing *dicta* to the contrary), the Tenth Circuit "ignores the need to show a link between passengers of a car and suspicion of wrongdoing, as explained in *Di Re, supra* ...." (Pet. App. at 55a-56a).

On further review, the Court of Appeals of Maryland affirmed, in a five-to-two decision, concluding:

> As we have indicated we do not dispute that Bosco's positive alert provided evidence of a commission of a crime and that Bosco's alert, alone, provided adequate probable cause for the officers to search the automobile without a warrant. However, without anything more than the positive canine alert to drugs in the automobile somewhere, *i.e.*, something more particular linking any one passenger in the car, including respondent, to the drugs sniffed by Bosco, there was insufficient probable cause to search the passengers of the automobile in question in this case. A canine alert on the exterior of a vehicle does not support the proposition that the drugs potentially in the car are concealed on a *particular* occupant of that vehicle. When the police get all of the occupants

> out of the vehicle and find no drugs in the vehicle,[3] they cannot use a positive general canine scan of the car as authority to go further and search a non-owner/non-driver passenger. In the case *sub judice*, the search of respondent on these facts was unlawful. The motion to suppress should have been granted.

(Pet. App. at 23a).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY RULED THAT A CANINE ALERT TO A VEHICLE, WITHOUT MORE, DOES NOT ESTABLISH PROBABLE CAUSE TO ARREST OR SEARCH THE PASSENGERS IN THE VEHICLE.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the Fourth Amendment requires that searches be reasonable, based upon probable cause, and conducted pursuant to a valid warrant, it permits warrantless searches within certain well-defined exceptions. See generally, *New York v. Belton*, 453 U.S. 454, 457, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirement. In 1981, police officers gained the authority to search the driver's person, the area within his or her control, and the car's passenger compartment,

---

[3] In this case, the occupants were searched before the vehicle was searched. (Pet. App. 28a).

including any open or closed containers, incident to a full custody arrest. *New York v. Belton*, 453 U.S. at 460.

This Court in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), held that police officers can compel the driver of a vehicle to exit the car, during a lawful traffic stop. The *Mimms* holding was extended, by *Maryland v. Wilson*, 519 U.S. 408, 410-11, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), to passengers as well.

In *Wilson*, this Court acknowledged that the personal liberty side of the balancing test, (public interest in officer safety versus the individual's right to personal liberty), weighs heavier for passengers than for drivers. *Id.*, 519 U.S. at 413. Probable cause gives police the authority to stop the vehicle and detain the driver, but usually, no such justification for detaining or stopping the passenger exists. *Id.* at 413.

In a 1999 decision, *Wyoming v. Houghton*, 526 U.S. 295, 307, 119 S.Ct 1297, 143 L.Ed.2d 408 (1999), this Court held that passengers' property left within the vehicle, when the occupants are ordered out of the car, falls within the permissible scope of a *Carroll* Doctrine warrantless search.

Under the *Carroll* doctrine, then, vehicles may be searched without a warrant, provided the officer has probable cause to believe that a crime connected item or items are within the car. *Belton* searches, by contrast, occur incident to a full-custody arrest and thus are supported by both the probable cause to effectuate the arrest and the strong interest in officer safety.

In the case at bar: (1) at no time, either during the suppression hearing or on appeal, has the Petitioner State ever argued that the "search" of Respondent Wallace

was justifiable as a *Terry* frisk or pat down, *Wallace v. State*, 142 Md. App. 673, 686 n.7, 791 A.2d 968 (2002); (2) at no time, either during the suppression hearing or in the Court of Special Appeals did the Petitioner State ever argue that Respondent Wallace was "arrested," at the time the "search" of his person took place; and (3) on appeal to the Court of Appeals of Maryland, the Petitioner State, for the first time, argued that Respondent Wallace was searched "incident to arrest," and that the canine alert to the exterior of the vehicle in which he was a passenger provided sufficient probable cause, without more, to "arrest" the passengers.

Respondent's predicament was described by Professor LaFave, in his treatise on the Fourth Amendment, W. R. LaFave, *Search and Seizure* (2d ed. 1987), §3.6(c) at 49:

> "Not infrequently it happens that a person the police have probable cause to arrest is found *in the company of some other person* who, at least prior to that time, could *not* have been arrested for a crime and frequently was not even known by the police or suspected in any way." (emphasis added).

In the case at bar, at best, the police had probable cause to arrest the man who admitted being the driver. Respondent was merely the "other person" in their presence. *Id.*

Professor LaFave cites, as "the leading case in this area," *id.*, this Court's decision in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948). LaFave summarizes the facts and the holding, *Search and Seizure*, §3.6(c) at 49, as follows:

> "There, an OPA investigator was told by one Reed that he was to buy counterfeit ration coupons from one Buttitta at a certain place, so the investigator and a detective trailed Buttitta's car to the

designated place. There they found Reed in the rear seat holding counterfeit coupons and upon being asked he said he received them from Buttitta, the driver. Di Re, a passenger in the front seat, was also arrested on the theory that his presence indicated he was also implicated in a conspiracy to knowingly possess counterfeit coupons, but the Supreme Court concluded that probable cause for this arrest was lacking...."

This Court explained, in *Di Re*, 332 U.S. at 593, 92 L.Ed. at 219:

> "There is no evidence that it is a fact or that the officers had any information indicating that Di Re *was in the car* when Reed *obtained* ration coupons from Buttitta, and none that he *heard or took part in any conversation on the subject.*
>
> * * * *
>
> An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is *farfetched when the meeting is not secretive or in a suspicious hide-out* but in broad daylight, in plain sight of passers-by, in a public street of a large city, *and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal.* If Di Re had *witnessed* the passing of papers from hand to hand, it would *not follow* that he *knew* they were ration coupons, and *if he saw* that they were rations coupons, it would *not follow* that he would *know* them be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. *Presumptions of guilt are not lightly to be indulged from mere meetings.*" (emphasis added).

See People v. Carnivale, 329 N.E.2d 193, 194 (Ill. 1975), wherein the illegal warrantless arrest was based on "[h]is mere presence in the same hotel lobby with the other two defendants whom the police suspected of gambling activities;" *see also State v. Jenison*, 442 A.2d 866 (R.I. 1982), *infra*.

Professor LaFave's excellent discussion of the implications of *Di Re* continues:

"*Di Re* also makes it clear that *companionship* with an offender at the very time of the latter's criminal conduct is *not* inevitably sufficient to establish probable cause for arrest of the companion. This is *particularly true* when, as in *Di Re*, it is *very possible for the criminal conduct to be occurring without the knowledge of the companion*. Thus, for example, it is beyond peradventure that a person may not be arrested simply because he was *in the company* of another individual who cashed a stolen check or who had *a lid of marijuana in the glove compartment of his nearby car*.

When the nature of the ongoing criminal activity is such that its existence is *not evident to others in the vicinity*, it is then necessary to give careful consideration to those aspects of the extent and nature of the association which may indicate that the associate is also an accomplice. A most useful example is provided by *United States v. Chadwick* [433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)], where there were grounds to arrest one associate but not another. One Machado and a woman accompanying him as his wife travelled via train from San Diego to Boston with a footlocker the authorities had good reason to believe contained marijuana. Upon arrival in Boston, Machado made a telephone call, and some time later they were met at the station by Chadwick. After the footlocker was loaded into his car and all three got into the car, agents arrested them all. *The court quite correctly held that there were not grounds to arrest Chadwick, for 'a non-criminal explanation of Chadwick's conduct is at least as likely as' a criminal one*. Specifically, the available facts made it no more likely that Chadwick was a participating 'mule' in the marijuana delivery than that he was simply a friend of the other two who kindly agreed to pick them up at the station." (emphasis added) (footnotes omitted).

Accord: State v. Neri, 290 So.2d 500 (Fla. App. 1974), wherein Neri and his codefendant were stopped, while "walking away from an unlighted house late at night," in a neighborhood known for "a number of burglaries." *Id.* at 501. Asked to identify himself, the codefendant said his identification was in his car. *Id.* When the codefendant opened the glove compartment, the police officer saw a "lid" of marijuana inside, and arrested both men. *Id.* Neri's arrest was held to be "without probable cause,"

which "taints and poisons the rest of the fruits derived subsequent to the unlawful arrest, including ... the confession" he gave the police. *Id.* at 502.

Similarly, in *Nast v. State*, 333 So.2d 103 (Fla. App. 1976), the police had no "probable cause" to arrest Nast, who had been sitting on a bench talking to another man, when the approach of the officer's patrol car caused Nast's companion to throw a plastic bag of marijuana over a seawall. *Id.* at 104. The court ruled that there was no showing of "constructive possession," where there was "no evidence on which the arresting officer at the time of the arrest could reasonably conclude that the appellant knew of the presence of the marijuana or had the ability to reduce it to his possession and control." *Id.* at 105.

In *United States v. Barber*, 557 F.2d 628 (8th Cir. 1977), the arrest of one Keller was "without probable cause," because it was based solely upon the fact that he drove his codefendant Barber to a liquor store, where Barber attempted to pass counterfeit money, as the driver waited in the car, parked where he "could easily see into the store," through the glass store front. *Id.* at 629-31. The court relied on the reasoning in *Di Re*, *supra*, and emphasized that Barber did nothing which could have "conveyed any overt indication of criminality" to Keller; therefore, Keller could not "be charged with an awareness" of the "criminal nature" of Barber's actions. *Id.* at 631.

A similar situation was presented, in *State v. Brazil*, 269 N.W.2d 15 (Minn. 1978), wherein the police had no probable cause to arrest the passenger in the defendant's car, after the driver entered a cafe and sold heroin, in a controlled buy. *Id.* at 16-17. The court observed that the police "must have concluded ... that since he was

with a drug peddler, he must be one himself, but mere suspicion doesn't satisfy the requirements of probable cause, and a person cannot be arrested ... merely because he is found in suspicious circumstances." *Id.* at 19 (citation omitted).

In the case at bar, as in *Di Re*, Appellant was not "meeting" with the others in a "secretive" place or "hideout." It was "very possible for the criminal conduct to be occurring without the knowledge of the companion." *Di Re*, *Neri*, *Brazil*, and *Chadwick*, all *supra*. There was no evidence that the smell of the cocaine was detectable by the human nose. In fact, "a non-criminal explanation of [Respondent's] conduct is at least as likely as" a criminal one, *Chadwick*, *supra*.

As the court noted in *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980)(film canister felt through clothing), the discovery of a hard object in Respondent's pants did not permit its seizure, even though drugs were suspected, in each case. This is particularly true, here, because the K-9 alerted only to the seams of the driver's door and not to the person of Respondent or any other occupant of the car.

It is also clear that, in the words of Officer Hertik, the police intended to "search" all the occupants. This was no mere "frisk" or "pat down." Officer Supko, who actually found the drugs, also called it a "search... for *anything* apparent, weapons, *whatnot*." (emphasis added). Under *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and the companion case of *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), a frisk consists solely of a limited patting of the outer clothing of the suspect for weapons, not contraband. In *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1993), this Court emphasized that

nothing in *Terry* can be understood to allow a search for "anything but weapons." *See* also *Florida v. Royer*, 460 U.S. 491, 510-11, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(Brennan, J., concurring); *Anderson v. State*, 78 Md. App. 471, 477-78, 553 A.2d 1296 (1989)(there is under the Fourth Amendment an ever-present requirement for the police to minimize even necessary intrusions); *Alfred v. State*, 61 Md. App. 647, 653, 487 A.2d 1228 (1985)(an unsuccessful frisk for weapons must not "degenerate into a search for and seizure" of something else); *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)(wherein "the incriminating character of the object was not immediately apparent" from feeling a lump in the pocket, rather, it was found to be contraband only after a further, illegal, search).

Other Jurisdictions

In *People v. Fondia*, 740 N.E.2d 839 (Ill.App. 2000), the Court dealt with facts remarkably similar to those in the case at bar. After a lawful traffic stop, an officer requested a police canine unit, while he was conducting computer inquiries and warrant checks. *Id.* at 840-41. The driver and two passengers remained inside the car, as the dog "alerted to the odor of illegal substances" at "the rear seam of the driver's door." *Id.* at 841. The police had the driver get out of the car and told her "that the dog had alerted and that the occupants of the vehicle and vehicle itself would be searched." *Id.* The defendant Fondia, a backseat passenger, was removed from the car and told "that the dog had alerted and that [Officer] Gallagher was going to search him." *Id.* The officer put his hand into the defendant's pocket, "felt a metal tube and removed it from defendant's pocket." *Id.* "Based on his training and experience, Gallagher recognized the tube to

be a crack pipe. Gallagher then handcuffed the defendant and completed the search." *Id.* The tube field-tested positive for cocaine, and the defendant was arrested for possession of drug paraphernalia. *Id.*

It was "stipulated" that the traffic stop was lawful and that "the dog was properly trained and had a highly accurate record." *Id.* The trial court ruled that the canine alert gave the police "probable cause to search the vehicle...and all of the occupants." *Id.*

On appeal, the Illinois court agreed that the alert by a dog trained to detect contraband gave the police "probable cause to believe that controlled substances were somewhere *either* within the car *or* on the person of one or more of its occupants." *Id.* at 842. "However, *before Gallagher searched defendant's person, he could have - - and should have - - had the dog sniff defendant to see if the dog would again alert.*" *Id.* (emphasis added). Noting that a canine sniff is not a search for purposes of the Fourth Amendment, under *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the court opined:

> *If a dog sniff had occurred and the dog alerted, then probable cause would have existed to search defendant's person. If, on the other hand, the dog did not alert after sniffing defendant but did alert as to one of the car's other occupants or as to the now-unoccupied car interior, then no basis would have existed to search defendant's person. By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in their power to do), the officer willfully denied themselves this additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of "willful ignorance."*
>
> *This posture of "willful ignorance" dissipates the reasonableness of the police conduct in this case*, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car. In *Houghton* [526 U.S. at

> 303], the Supreme Court wrote of the "unique, significantly heightened protection afforded against searches of one's person and quoted the following from *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968): "Even a limited search of the outer clothing...constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.'"

Fondia, 740 N.E.2d at 842-43 (emphasis added).

"However intrusive a dog sniff might seem, the search of one's pockets, as this Court explained in *Houghton*, [526 U.S. at 303], is far more intrusive," noted the court. *Fondia, supra* at 844.

In *Fondia*, the court distinguished cases such as *People v. Boyd*, 700 N.E.2d 444, 450 (1998), wherein an officer's smelling "the odor of burnt cannabis emanating from a lawfully stopped car" gave him probable cause to search the defendant, a passenger.

In *Boyd*, any passenger in the car wold have been fully aware of the presence of the drugs, because of the burning smell detected by the police officer. However, in *Fondia* as in the instant case, the presence of drugs was not apparent to the police officer, at all, any more than it could have been detected by any passenger's sense of smell. The smell of the drugs was apparent only to a specially trained dog.

In *Fondia*, that court also rejected "speculation" by "the appellate prosecutor" and the dissenting judge, that the trained dog sniffing a person might "be confused by body odors or proximity to a human being." *Id.* at 844. The majority noted that "the record is totally devoid of anything that would support such speculation" or "musings about dangers that could be caused by a dog's alerting to an individual." *Id.*

The *Fondia* court also distinguished *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), wherein the Fifth Circuit found an unreasonable search of school children using a dog. In that case, there was "exploratory sniffing" by dogs of students in a school setting when no basis existed to focus on the students being sniffed. *Horton*, 690 F.2d at 473-74. "[T]he *Horton* court ... was concerned that the dog in that case touched and scratched at students," and *Horton* "specifically declined to address 'whether the use of dogs to sniff people in some other manner, *e.g.*, at some distance, is a search.' *Horton*, 690 F.2d at 479." *Fondia, supra* at 844.

An Illinois case, preceding *Fondia*, was *People v. Drake*, 683 N.E.2d 1215 (Ill.App. 1997). There, sheriff's deputies investigating gang and drug activities lawfully stopped a car driven by and registered to John Goodman, who was believed to be a member of the Vice Lord gang. *Id.* at 1217-18. The car had expired license plates. *Id.* The deputy believed that the defendant, seated in the front, passenger seat, "had a Vice Lord affiliation and the house they had just left was known as a Vice Lord house." *Id.* at 1218. An informant had implicated Goodman in smuggling weapons. *Id.* The deputies instructed the occupants to exit the car and patted them down, finding no weapons. *Id.* Goodman consented to a search of the car. *Id.* In the trunk, a deputy found a closed backpack containing a stolen handgun, and when he unzipped the bag, he also found two bags of marijuana. *Id.* All occupants of the car were arrested, and passenger Drake was charged with firearm and drug offenses. *Id.* at 1216-17.

At Drake's trial, the motion to suppress the evidence seized was granted, because "there was no probable cause to arrest" him. *Id.* at 1217. On appeal, that ruling was affirmed. *Id.*

The *Drake* court reasoned that the passenger "was not doing anything unusual or unlawful at the time of the stop," and

> The evidence showed that defendant might be associated with a gang and contraband was found in a locked trunk. However, there was no evidence presented that defendant in this case had any degree of dominion or control over this area of the vehicle or of the contraband or that he even knew what was in the backpack.

Id. at 1219. "Absent additional evidence connecting the defendant to the contraband either through his knowledge or possession, his mere presence as a passenger in the vehicle is insufficient to establish probable cause to arrest." *Id.* at 1220.

In *Rogers v. State*, 586 So.2d 1148 (Fla.App. 1991), an informant told police that Rogers would be coming to a particular restaurant, at a particular time, transporting cocaine in a burgundy mini-van, and that his girlfriend Shelly Tam would be with him. *Id.* at 1150. The police verified that Rogers owned such a van and that he had two previous narcotics convictions. *Id.* When Rogers drove the van up to the restaurant at that hour, police asked the driver Rogers and his four passengers to exit. *Id.* Codefendant Shelly Tam was the front seat passenger. *Id.*

A trained canine "alerted to the presence of narcotics in the seat pocket attached to the back of the front passenger seat," in which Tam had been sitting. *Id.* After finding envelopes of cocaine in the seat pocket, police arrested the driver Rogers. *Id.*

An officer asked Tam for her purse and searched it, finding more cocaine, and arrested her. *Id.*

The trial court ruled "that the discovery of the contraband in the van gave the police probable cause to arrest" both Rogers and Tam. *Id.* As to the driver Rogers, the appellate court agreed that the stop was lawful and that the "discovery of the cocaine in the seat pockets provided probable cause to arrest... Rogers." *Id.* at 1151. However, the Court ruled, there was "no basis for the arrest of Tam or the search of her purse." *Id.* 1150.

The appellate court reasoned that Tam "was standing some distance from the vehicle" and she did not give "permission to search her purse." *Id.* at 1151. Moreover,

> *The K-9 dog did not alert to contraband on or about Tam's person.* The informant, although stating that Tam would accompany Rogers, did not implicate her in the possession of contraband. There were no facts or circumstances which would give rise to probable cause that Tam had contraband in her immediate possession.
>
> If the search of Tam's purse is to be upheld it must be on the basis that the police officer had probable cause to arrest Tam for actual or constructive possession of the cocaine found in the van.

Id. at 1151 (emphasis added). The police had no reason to believe that Tam knew of "the presence of the cocaine," or knew of "the illicit nature" of what was in the seat pocket, or shared "dominion and control over it." *Id.* "Mere proximity to contraband, standing alone, is insufficient to establish constructive possession of the substance." *Id.* "In like manner, ***mere proximity to contraband is insufficient to create probable cause of constructive possession.***" *Id.* at 1151 (emphasis added), citing *Edwards v. State*, 532 So.2d 1311 (Fla.App. 1988), *review denied*, 542 So.2d 990 (Fla. 1989).

"Neither does reasonable cause for the searching of an automobile justify the search of the person of one of the occupants." *Id.*, citing *DiRe*, *supra*.

The majority in *Rogers* rejected the dissenter's claim that it had "applied the standard of proof for constructive possession at trial..., rather than the lesser probable cause standard" for making an "arrest with only reasonable grounds to believe a person has committed a felony." *Id.*, 586 So.2d at 1152. "The facts of this case do not support a reasonable belief as to any one of the elements of constructive possession and, therefore, no arrest was possible." *Id.*

As in *Fondia*, *supra*, the *Rogers* court distinguished cases such *Dixon v. State*, 343 So.2d 1345 (Fla.App. 1977), cited by the dissent. In *Dixon*, "the vehicle's occupants were, as a group, surrounded by smoke and the smell of marijuana, whereas in this case, we are dealing with an odorless white powder concealed in a pocket of the vehicle." *Rogers*, *supra* at 1152.

A similar result was later reached, by the same court, in *Rennard v. State*, 675 So.2d 1006 (Fla.App. 1996). The defendant was a front seat passenger in a car stopped at a roadblock set up to check for intoxicated drivers and to inspect driver's licenses and vehicle safety equipment. *Id.* at 1007. Ultimately, this check revealed that the driver had a suspended license and an outstanding arrest warrant. *Id.* While that computer check was taking place, a K-9 dog was brought over, and the driver agreed to let the deputy search the car. *Id.* The dog "alerted," while walking around the car, and "alerted on four areas" inside the car: "under the driver's seat, the space between the driver and passenger seats, a brief case on the back seat and a tool box in the hatchback

area." *Id.* Deputies found: "paraphernalia, including scales with methamphetamine residue, under the driver's seat" and "[p]araphernalia... in a tool box in the hatchback area." *Id.* Deputies originally arrested both the driver and passenger for drug violations. *Id.* Later, the defendant passenger was "charged only with possession of methamphetamine which was found in his pocket after he was arrested." *Id.*

On appeal, the Court ruled that, while the "search of the vehicle was lawful," there was no "probable cause for the arrest and subsequent search of the defendant," a passenger. *Id.* at 1008. "[T]here were no facts to support a reasonable belief that he had constructive possession." *Id.* Citing *Rogers*, *supra*, the Court noted that,

> The only paraphernalia located close to the defendant was found under the driver's seat by the transmission hump. One of the investigating deputies testified that the paraphernalia would not be visible to someone sitting in the front passenger seat. None of the deputies testified that they had any reason to believe that the defendant knew of the presence of the contraband in the vehicle. ***Mere proximity to contraband does not create probable cause of constructive possession. See Rogers*** [***supra***].
>
> The defendant was arrested solely because he was a passenger in the vehicle. ***Discovery of contraband in a vehicle does not, in and of itself, establish probable cause to arrest all the occupants of the vehicle.*** Because the defendant was searched pursuant to an unlawful arrest, the items seized from his pocket must be suppressed.

Id. at 1008 (emphasis added).

The defendant was a back-seat passenger in a car stopped for expired registration, in *State v. Riddle*, 531 N.W.2d 408 (Wis.App. 1995). The state trooper thought the defendant passenger made some suspicious movements, after the vehicle

was stopped. *Id.* When a check revealed that the driver's license was suspended, the trooper ordered him to follow his patrol car to headquarters, "to post bond." *Id.* at 409.

At police headquarters, the driver consented to a search of the car, and cocaine was found in the trunk. *Id.* "Immediately..., all four occupants of the vehicle" were arrested. *Id.* at 410.

The trial court found "probable cause for the arrest" of the passenger Riddle. *Id.* On appeal, the Court reversed, noting,

> While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, *the defendant's guilt must be more than a mere possibility for the arrest to be constitutional.* Further, in determining whether probable cause existed, we do not look to the officer's subjective beliefs, but apply an objective standard based upon the circumstances as they were at the time of the arrest.

Id. at 410 (emphasis added). Furthermore, the passenger Riddle was not in possession of the cocaine and did not "control" the trunk where it was concealed. *Id.* While Riddle's movements in the back seat were allegedly suspicious, he "never objected" to the stop and "never attempted to gain access to the trunk prior to the search." *Id.* Riddle's suspicious movements "had absolutely no relation to the cocaine in the trunk." *Id.* at 411.

Moreover, there was no "reasonable basis" for the arresting officer to conclude that Riddle was "an accomplice... engaged in a conspiracy" to possess or sell the cocaine. *Id.* Furthermore,

> At the time of the arrest..., there was absolutely no evidence to establish Riddle's complicity in such an offense, other than the fact that the four individuals were traveling together in the vehicle

> where the cocaine was found. This fact was not sufficient to provide [Trooper] Hotvedt with probable cause to believe that Riddle was engaged in a conspiracy. One's companionship with an offender who is breaking the law does not provide a law enforcement officer with probable cause to arrest the companion. *See United States v. DiRe* [*supra*] "This is particularly true when, [as here], it is very possible for the criminal conduct to be occurring without the knowledge of the companion." 2 Wayne L. LaFave, Search and Seizure §3.6(c), at 52 (West Supp. 1995).

Riddle, 531 N.W.2d at 411.

The driver owned and operated the car in which "the cocaine was concealed beneath the floor mat in the trunk," and while "probable cause may have existed" for the driver's arrest, that "did not provide [Trooper] Hotvedt with probable cause to arrest" his "companions, including Riddle". *Id.*

In *Riddle*, *supra* at 411, the Court distinguished *Jackson v. State*, 643 A.2d 1360 (Del. 1994), wherein a passenger was lawfully arrested for possession of marijuana and a metal pipe found in the passenger compartment. The *Riddle* court noted that the "arrest" of the passenger in *Jackson* was based upon "probable cause," because "'the contraband was found *in a non-secretive location*,'" which alerted all the occupants to its presence and illicit nature. *Riddle*, 531 N.W.2d at 411, citing with emphasis *Jackson*, 643 A.2d at 1365. By contrast, "there is no evidence that Riddle had a key to the trunk or that he ever had access to the trunk." *Riddle*, at 411.

The defendant was a passenger in a pickup truck lawfully stopped for a cracked windshield, in *People v. Foster*, 788 P.2d 825 (Col. 1990). The driver consented to the officer's examination of an all-terrain vehicle (referred to as a "motorcycle") in the back of the pickup. *Id.* at 826-27.

A "computer check" revealed that the A.T.V. was "reported stolen," and the officer arrested both the driver and the passenger for theft. *Id.* at 827. Incident to the arrest, a search of the passenger revealed cocaine in his wallet. *Id.* When the A.T.V. later turned out to have been erroneously reported as "stolen," even after it had been "recovered," the passenger was convicted only of drug possession. *Id.*

The trial court in *Foster* suppressed the cocaine, finding no reason to doubt "the good faith of the officers in believing that the A.T.V. was stolen," but holding that, "There's nothing to show that Mr. Foster had any knowledge of the actual theft or knowledge of the stolen nature of the vehicle," at the time the passenger was arrested for theft. *Id.* at 827.

On appeal, the State argued that when the officer learned, "in good faith," that the A.T.V. was listed as "stolen," police had "probable cause to arrest both... the owner and operator of the pickup truck, and the defendant, the passenger." *Id.* at 828. The Supreme Court of Colorado rejected the State's argument, reasoning that, "the mistaken information, even if true... did not rise to the level of reasonable grounds to believe that the defendant committed or was committing a crime." *Id.* at 830. The Court found *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) to be "the controlling precedent." As in *Di Re*, the passenger was with the driver, not in a "secretive" meeting or "suspicious hide-out," but on "a public street," and "the alleged substantive crime is one which does not necessarily involve any act visibly criminal." *Foster*, 788 P.2d at 828.

The *Foster* court relied in part on its decision in *Mora v. People*, 496 P.2d 1045 (Col. 1972). In *Mora*, an informer told police that one Fred Vigil would be driving a certain car containing stolen clothing. *Foster*, *supra* at 829. The police located that car, parked near a liquor store, with Vigil in the driver's seat. *Id.* The defendant Mora came out of the liquor store and got in Vigil's car, and they drove away. *Id.* The police stopped the car, "opened the trunk, and observed the stolen clothes described by the informer," and "arrested" both the driver and Mora for "burglary and receiving stolen property." *Id.* At the station house, Mora discarded a matchbook containing a partially smoked marijuana cigarette. *Id.* Mora was convicted of drug possession. *Id.*

On appeal in *Mora*, that Court found "no probable cause for his arrest." *Mora*, 496 P.2d at 1047:

> The record is devoid of evidence to show that the officers observed any criminal activity on the part of Mora or that Mora was connected in any way with disposition of the allegedly stolen merchandise. Moreover, the record fails to reveal that Mora was even aware of the presence of the clothing which was found in the trunk of Vigil's car.

The "only fact linking Mora" to the crimes for which he was arrested "was his physical presence in Vigil's car." *Id.* "Mora's physical presence in the automobile, in and of itself, did not provide probable cause to arrest," said that Court, citing *DiRe*. *Mora*, 788 P.2d at 829. "'Guilt by association has never been an acceptable rationale and it does not constitute probable cause to arrest.'" *Id.*, quoting *People v. Feltch*, 483 P.2d 1335 (Col. 1971), and citing generally, *Sibron v. New York*, 392 U.S. 40, 88 S.Ct.

1889, 20 L.Ed.2d 917 (1968), and *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). Moreover,

> Having arrested Mora illegally, the prosecution cannot now claim that the evidence obtained as a result of the arrest need not be suppressed because it was abandoned. *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960).

Mora, 496 P.2d at 1047; *Foster*, 788 P.2d at 829. "[P]robable cause requires reasonable grounds to believe that the *person arrested* has committed or is committing a crime." *Id.* (emphasis in original).

After conducting surveillance of room 249 of the Carlton House motel, police arrested several occupants for possession of a large quantity of marijuana, in *State v. Jenison*, 442 A.2d 866 (R.I. 1982). The officers at the scene were interrupted by the arrival of Joel Jenison, who parked his car, opened the trunk, tucked an object into his pants and placed his shirt over it. *Id.* at 870. Leaving his female passenger, codefendant Michele Cory in the car, Jenison knocked on the door of the same motel room and started to say something. *Id.* Within two minutes, Jenison returned to his car, opened the trunk, and took the object out from under his shirt. *Id.* An officer recognized that the object was a gun and officers arrested Jenison. *Id.* In the trunk, police found a briefcase containing $51,000 and two suitcases, one of which held $100,000. *Id.*

Codefendant Cory "remained in the car," while Jenison was advised of his rights. *Id.* Then, an officer asked her to step out of the car, and when she did, he "took possession of her pocketbook," made "a cursory search for weapons," and found none. *Id.* A later search of the pocketbook at the police station revealed six ounces of

cocaine. *Id.* at 871. Both the driver and passenger were charged with possession of cocaine with intent to deliver. *Id.* at 869.

As to the passenger Cory, the trial court ruled "that the first search of the pocketbook was permissible as incident to a valid arrest," but that "the second search" of the pocketbook required a warrant, as the exigent circumstances had dissipated. *Id.* at 873. On appeal however, the Court ruled that "the first search of the pocketbook" was not "permissible as incident to a valid arrest," because there was not "probable cause... to arrest" the passenger. *Id.* The Court reasoned that

> At the time Officer Tripp approached Cory and asked her to "step out of the car," she was merely an individual situated at the site where narcotics activity had taken place earlier in the afternoon. She was also the female passenger in a car driven by Joel Jenison, a person suspected of criminal activity. These facts, the only ones known to police at the time of Cory's arrest, do not establish probable cause. The fact that an individual is in the presence of or associating with others who are suspected of criminal activity does not, by itself, establish probable cause to arrest such person.
>
> In conclusion, we are of the opinion that Cory's mere presence in Jenison's car was insufficient to establish the existence of probable cause to arrest. The search of Cory's pocketbook at the Carlton, therefore, was not a permissible search incident to a valid arrest. *Id.* at 874 (citations omitted).

In *Woodbury v. State*, 730 So.2d 354 (Fla App. 1999), a passenger was searched, because a police canine alerted to the exterior of the passenger side front door. While the conviction was affirmed, the issue of lack of probable cause "was not raised or argued" in the trial court and was therefore "waived" on appeal. *Id.* at 355. However, both the concurring and the dissenting judges noted that a dog alert on a

vehicle, in and of itself, cannot authorize the arrest and search of all of the occupants of that vehicle. *Id.* at 355-59.

Cases distinguished

Unlike the case at bar, *People v. Hansen*, 761 N.E.2d 376 (Ill.App. 2001), *Dixon v. State*, *supra*, and *People v. Boyd*, *supra*, all involved a pervasive smell of burnt marijuana, making it perfectly obvious to a passenger that an illegal drug was in the car. Similarly, *Jackson v. State*, *supra*, involved drugs "in a non-secretive location" which was obviously known to the passengers.

This was also not a case like *Horton*, *supra*, wherein it was found unreasonable to use a police dog to touch and "scratch at" terrified school children. Use of a properly trained dog merely to sniff at an adult suspect is not a search. *See United States v. Place*, *supra* at 707; *Fondia*, *supra*.

This is also not a case wherein the State made any record, below, to support speculation that the properly trained dog used in this case would be unable to properly detect the smell of drugs on a person, as opposed to within a car. *See Fondia*, *supra* (rejecting such "speculation").

Moreover, as in *People v. Foster*, *supra*, this is not a case in which the "good faith" of the officers has any relevance, because, assuming the truth of all testimony provided by the police, the information known to the officers still "did not rise to the level of reasonable grounds to believe that the defendant committed or was committing a crime." *Id.* at 830.

This is not a case like *Wyoming v. Houghton, supra*, in which the contraband was found inside the car, contained in the personal belongings of a passenger. The search, here, was a search of the passenger's person, after he was removed from the car.

The Petitioner State, in the case at bar, cites *United States v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994), for the proposition that when "a dog 'alerted' to the vehicle" exterior, "there was probable cause to arrest" both the driver and passenger. However, as that Court noted, "*Both* [the driver and passenger] *consented to a search of the car*," and the only contraband seized was 182 pounds of marijuana concealed in the "*trunk*". *Id.* at 1508-09 (emphasis added). Herein, the Petitioner State relies on *dicta* in that case. Moreover, the case at bar involves a search of the person of the passenger, not the trunk.

Similarly, in another case cited by the Petitioner State, *United States v. Garcia*, 52 F.Supp.2d 1239 (D.Kan. 1999), a federal district judge ruled that "Garcia consented" to the search, and he did not even contest the validity of his consent, on appeal. *Id.* at 1253. Here, the Petitioner State relies on the *dicta* in *Garcia*, which, in turn, relied on the *dicta* in *Klinginsmith*. *Garcia* also cites: *United States v. Shayesteh*, 166 F.3d 349 (10th Cir. 1998), however that was a case in which the driver was the sole occupant of the car; and *United States v. Williams*, 726 F.2d 661, 663 (10th Cir. 1984), which "was a luggage case more similar to *Royer* than to automobile cases," noted the Court of Special Appeals. (Pet. App. at 48a-49a).

To contradict the *Fondia* holding, the Petitioner State cites only one other case, *People v. Staley*, 778 N.E.2d 363 (Ill.App. 2002). The Petitioner overlooks the fact

that *Staley* was decided by the very same court as *Fondia*. Moreover, that court distinguished its prior decision in *Fondia*, which involved merely a drug dog's alert to the car's exterior, whereas in *Staley*, there were several reasons to suspect the passenger, individually, of possessing drugs, even before the dog alerted to the car:

> In this case, the trial court found that (1) defendant made a "very short visit" at 2 a.m. to a "known drug house"; (2) upon leaving that house, defendant returned to a car that was unusually parked; and (3) during the traffic stop, the officers observed that defendant's conduct was suspicious.... We conclude that *those facts, when viewed together with the dog's alert* on the passenger-side interior door panel, would lead a reasonably prudent person standing in the officers' shoes to conclude that defendant had committed the crime of possessing contraband. We thus affirm the trial court's determination that probable cause existed to search defendant.
>
> *In so concluding, we fully agree with the trial court's analysis of our decision in Fondia and the court's determination that this case is distinguishable.*

Staley, 778 N.E.2d at 367-368 (emphasis added).

Citing only the *dicta* in two cases, the Petitioner strains to find some "conflict in the lower courts" for this Court to "resolve." (Pet. App. at 6). There is no such conflict.

Maryland cases

Respondent's trial counsel cited *Livingston v. State*, 317 Md. 408, 564 A.2d 414 (1989), in support of his argument that the police lacked probable cause to search him. (Pet. App. at 619).

In *Livingston* at 408, the Court described the facts, as follows:

> Petitioner, Wesley Warren Livingston ("Livingston") was one of three occupants of an automobile speeding southbound on I-95, in

> Cecil County, Maryland. The car was stopped shortly after midnight by State Trooper Lawrence Nelson ("Nelson"). Livingston, who was not the owner of the vehicle, was seated in the backseat. Notwithstanding the darkness of the hour, the trooper, with the aid of his 30,000 candlepower flashlight, managed to discern two marijuana seeds located on the right front floorboard of the car. Nelson arrested each of the car's occupants for possession of the seeds. During a search incident to the arrest, Nelson discovered cocaine and marijuana in Petitioner's pocket.

That Court concluded that, when he "spotted the seeds in the beam of his flashlight, the trooper had probable cause to believe that a misdemeanor -- possession of marijuana -- was being committed in his presence. But *which* of the vehicle's occupants was committing the misdemeanor?" *Id.* at 413 (emphasis added). In short, the mere presence of the drug was "insufficient to inculpate Livingston, a rear seat passenger ...." *Id.* Livingston's arrest "lacked probable cause," and the evidence seized was tainted by the illegal arrest. *Id.*, 317 Md. at 416.

In *Collins v. State*, 322 Md. 675, 589 A.2d 479 (1991), Collins and four other black men were standing next to a Mustang automobile, in the driveway of a car dealership, at 3:00 a.m. *Id.*, 322 Md. at 677. A police officer stopped to investigate. *Id.* The men said they were looking at BMW's for sale. *Id.* One of the men, Steven Lewis, identified himself as the driver of the Mustang. *Id.* Shining a flashlight into the car, the officer saw on the back seat a black plastic 35 mm film container, which he knew was commonly used to contain drugs for sale. *Id.* The officer asked another of the men, Kevin Parker, to retrieve the film cannister and to say what was in it. *Id.* at 677-78. Parker answered, "I don't know; it is not mine." *Id.* at 678. Asked to open it, Parker did so, but he "attempted to conceal its contents 'by cupping his hand over top

of it.' He again stated that he did not know what was in the container." *Id.* Inside the container were over twenty individually wrapped cellophane packets of cocaine. *Id.* The officer arrested all five men, and in a separate trial, Collins was convicted of possessing the drugs. *Id.*

On appeal, the Court of Special Appeals affirmed, but the Court of Appeals of Maryland reversed, in light of *Livingston*. *Collins*, *supra*. That Court cited several defects in the State's evidence of probable cause to arrest, including that there was no evidence that Collins, even if he was a passenger,

> *knew* the suspected cocaine was in the back seat of the car. *Even if the police had probable cause to arrest Lewis or Parker for unlawful possession, there was no probable cause to arrest Collins.* As there was no evidence which *criminally linked* Collins to either the car, or *to the film canister*, there was no probable cause to believe that he committed or attempted to commit a felony as required by Art. 27, §594B.

Collins, 322 Md. at 682-83 (emphasis added).

The State in this case relied in part on *Lee v. State*, 311 Md. 642, 537 A.2d 235 (1988). In *Lee*, the search of a gym bag preceded the arrest of two persons, but the search was held "incident to a valid arrest, inasmuch as there was probable cause to support an arrest at the time of the search." *Id.* at 668.

Lee is easily distinguished from the instant case, because in *Lee* an informant told police that both of "two suspects had bragged that they had done a Robbery" of a particular liquor store, and "the two responsible" would be found at certain tennis courts, "with a small blue bag that would have a handgun." *Id.* at 649. When police observed the individuals matching the informant's detailed description, at the tennis

courts, they watched as "each of the two" suspects "separately held the same gym bag." *Id.* at 646,651.

In *Lee*, unlike in the case at bar, the police had ample probable cause to arrest each person, individually. There was absolutely no issue in *Lee* involving a mere companion or passenger of a person suspected.

A recent Maryland case is *State v. Funkhouser*, 140 Md. App. 696, 782 A.2d 387 (2001).

Funkhouser was the driver and sole occupant of a vehicle stopped for turning right at a red traffic light without coming to a complete stop, by detectives who had received a "tip" that he was in possession of a large quantity of cocaine. *Id.*, 140 Md. App. at 701-02.

The question of whether or not Funkhouser consented to the search of the car was in dispute, at the suppression hearing. Funkhouser was ordered out of the car. *Id.* at 707.

After a detective made a radio check of Funkhouser's driving record and any outstanding warrants, he had "a trained and certified cocaine-sniffing canine" scan the exterior of the car, and the dog "made a positive alert at both the front driver's side door and the front passenger's side door." *Id.* at 708.

After a search of his vehicle proven unproductive, the detectives removed the "fanny pack" which Funkhouser had buckled around his waist, unzipped it, searched it, and found cocaine. *Id.* at 701.

At the suppression hearing, "[t]he only theory of justification advanced by the State" for seizing the fanny pack was "that Funkhouser, by virtue of his recent presence in the vehicle, was for *Carroll* Doctrine purposes a mere extension of the vehicle." *Id.* at 712. The Court of Special Appeals ruled that,

> there is no case, state or federal, that has ever stretched the perimeter of a *Carroll* Doctrine search to embrace a *former occupant* of a vehicle who is at the moment of search already *outside* the vehicle. There has *never* been a *Carroll* doctrine search of a *person.*

Id. at 712 (emphasis added).

That Court called the State's argument "indistinguishable" from that rejected by this Court in *United States v. DiRe, supra.*

Moreover, the Court of Special Appeals noted that *Wyoming v. Houghton, supra*, is "totally unlike" Funkhauser's case, because *Houghton* validates the search of "'a passenger's personal belongings *inside an automobile.*" *Id.* at 714-15, (emphasis added), quoting *Houghton*, 526 U.S. at 297. The belongings must be "*found in the car.*" *Id.* (emphasis added), citing with emphasis *California v. Acevedo*, 500 U.S. 565, 572, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991)("'containers *in cars* could be searched without a warrant because of *their presence within the automobile'*"); and *United States v. Johns*, 469 U.S. 478, 479-80, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) ("'if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any container *found inside* that may conceal the object of the search').

The Court of Special Appeals emphasized that the *Wyoming v. Houghton* opinion "is fleshed out" in the concurring opinion of Justice Breyer, 526 U.S. at 308, who explained that the rule "does *not extend* to the search of a *person* found in that automobile," inasmuch as "*the search of a person, including even "'a limited search of the outer clothing,'" is a very different matter in respect to which the law provides "significantly heightened protection.*" *Id.*, 140 Md. App. at 715-16 ("emphasis added"). Justice Breyer noted that "*it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of outer clothing*," citing *Terry v. Ohio*, *supra* at 24, *which under the Court's cases would properly receive increased protection. Id.*, 140 Md. App. at 716 ("emphasis added").

In *Funkhouser*, "the 'fanny pack,' strapped around the waist of Funkhouser, was as much a part of Funkhouser's outer clothing as was the overcoat worn by John Terry in *Terry v. Ohio*." *Id.* at 716. "It was as intimately a part of his person as would have been a money belt strapped around his waist, a wallet in his pocket, or a woman's purse actually being held in the hand of its owner." *Id.* As Justice Scalia noted in his majority opinion in *Houghton*, "if the dissent thinks 'pockets' and 'clothing' do not count as part of the person, it must believe that the only searches of the person are strip searches." 526 U.S. at 303 n.1; *Funkhouser*, *supra* at 716-17.

In *Funkhouser*, as in the case at bar,

> *On appeal the State now advances an additional theory of* Fourth Amendment justification that it had *not advanced* before Judge Lerner *at the suppression hearing.* It now claims that the

> same probable cause that justified the *Carroll* Doctrine *search of the Jeep Wrangler* was, *ipso facto*, probable cause to *arrest Funkhouser* and that the search of Funkhouser's person, including the "fanny pack," *was a search incident to lawful arrest.*

Id. at 717 (emphasis added).

The Court of Special Appeals held that the State failed to preserve that argument for appellate review. *Id.* "The exception to the warrant requirement for a search incident to lawful arrest was never mentioned, let alone argued," at the suppression hearing. *Id.* "[I]t was the State that was objecting, on very specific grounds, to the exclusion of evidence." *Id.* "The State, in effect, was objecting to the exclusion of evidence on the specific ground that its warrantless seizure was justified by the *Carroll* Doctrine." *Id.* "'[T]he objector is bound by the grounds he states, and he normally is deemed to have waived any objection to the evidence on a ground not stated.'" *Id.*, quoting *State v. Kidd*, 281 Md. 32, 39, 375 A.2d 1105 (1977). The Court cited with emphasis, *inter alia*, *Chertkof v. Dept. of Natural Resources*, 43 Md. App. 10, 16, 402 A.2d 1315 (1979) (*"the Respondent would be precluded from raising a theory in this appeal upon which it now relies for the first time.... A petitioner is bound to the theory he elects to pursue at trial."*)

After the canine alerted, inside the car, to the driver's seat, but no drugs were found in the car, the police had probable cause to arrest Funkhouser, the sole occupant. *Id.* at 721. Instead, they searched his "fanny pack," then arrested him. *Id.*

> The Court of Special Appeals held,
>
> Probable cause to believe that a person is carrying evidence does not justify a warrantless search of the person any more than probable cause to believe a home contains evidence justifies a

> warrantless search of a home. Only places or things enjoying a lesser expectation of privacy, such as automobiles, are vulnerable to probable-cause-based warrantless searches for the purpose of discovering and seizing evidence of crime.
>
> That the police have probable cause for a lawful arrest of a person does not in and of itself justify a warrantless search of that person. The search must be incident to an arrest itself. It may not be incident merely to good cause to make an arrest. The existence of an unserved warrant of arrest, for instance, would not justify a warrantless search of a person who is not actually arrested. As this Court observed in *DiPasquale v. State*, 43 Md.App. 574, 577, 406 A.2d 665 (1979):
>
> > *That the facts here might have established probable cause for an arrest of the Appellant*, even before the baggie was seized, and for a good search incident thereto which would have produced the baggie *is beside the point. No arrest was made until after the seizure and the arrest was predicated on the observation of the thing seized.* (Emphasis supplied).

Id. at 724-25.

In *Funkhouser*, the Court of Special Appeals noted that the State's argument was the same one rejected by this Court in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). There, the Iowa police had both probable cause and lawful authority to make a custodial arrest of Knowles for a speeding violation. Instead, they first issued a traffic citation and elected to search the car. 525 U.S. at 115. Finding drugs, they arrested the driver. *Id.*

On appeal, this Court reversed, reasoning that only a custodial arrest will support a warrantless search incident to arrest. *Id.*, 525 U.S. at 115-117.

See also *Bouldin v. State*, 276 Md. 511, 515-16, 550 A.2d 130 (1976) (*"the record must satisfactorily demonstrate that an arrest was in fact consummated*

before a warrantless search incident thereto may be found to be lawful") (emphasis added); *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); *Anderson v. State*, 78 Md. App. 471, 480-81, 553 A.2d 1296 (1989) ("the exception, by its very name as well as its *Raison d'etre*, is *'search incident to arrest'* and not *'arrest incident to search'*")(emphasis added).

As in the case at bar, the State argued in *Funkhouser* that because "the arrest followed the search almost immediately thereafter," it was 'essentially contemporaneous.'" *Id.* at 731. But that Court held:

> In this case it is clear, however, that no decision to arrest Funkhouser had been made and that the seizure and search of the "fanny pack" was no mere incident of an arrest already in motion, even if moments behind, on a parallel track. It was, rather, the finding of suspected drugs in the "fanny pack" that was the precipitating or catalytic agent for Funkhouser's arrest in this case. There is no suggestion that Funkhouser was going to be arrested regardless of what the search of the "fanny pack" revealed. This was an arrest incident to search.

Id. at 731.

See also *Smith v. Ohio*, 494 U.S. 541, 543, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (wherein the police grabbed and searched a paper grocery bag which Smith was carrying very "gingerly" and attempting to shield from the police; held: "an incident search may not precede an arrest," and the exception "does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.").

In sum, the *Funkhouser* holding was: (1) the warrantless search of the "fanny pack" worn by the defendant cannot be justified as a *Carroll* Doctrine search, because an occupant is not "a searchable extension of the car"; and (2) the State's alternate theory, even if properly preserved, that the search was incident to a lawful arrest fails, because there was no antecedent arrest. *Id.* at 734.

The instant case

Respondent submits that the record in the instant case is crystal clear, on the following points: (1) the State did not argue, at the suppression hearing the only theory advanced, for the first time on appeal, that the search of Wallace was "incident to a lawful arrest"; (2) the police told the occupants that they would be "searched," because the dog alerted to the exterior of the car, (Pet. App. at 4a); (3) Respondent Wallace was not handcuffed, until the officer who "searched" him felt a "hard object" inside his pants which was "balled up" and "the size of your fist," but which he admittedly knew was not a weapon, (Pet. App. at 5a, 27a); (4) the officer testified, "There is no question....it was a search;" (5) after detecting the round object, the officer "let him know that I was going to remove it,"; (6) then, the officer handcuffed Wallace, telling him "that I was going to place him in handcuffs but he was not under arrest. It was just for my safety and his safety to be placed in handcuffs," (Pet. App. at 27a); as the officer "moved" Wallace away from the curb up onto a grassy area, Wallace began moving his "whole body" and his "hips back and forth," until the round object fell down his pants leg and protruded from beneath the cuff of his pants. (Pet. App. at 27a).

From the cases cited herein, it is also clear that the State waived the issue of whether or not this was a "search incident to arrest," the only argument it later made on appeal. *Funkhouser*, *Kidd*, *Chertkof*, all *supra*.

Furthermore, if preserved, the State's sole argument would fail, because: (1) this was clearly a "search" which preceded and was intended to justify the ensuing arrest; and (2) it was not a search incident to a lawful arrest, where the search of the passenger, based solely on the alert to the exterior of the car, was unlawful.

Trial counsel noted in argument that the State's position in this case has disturbing implications for those who use public transportation, as well as private cars. For the first time, the State now claims the right to arrest and search all passengers in any vehicle, merely because a trained drug dog alerts to the exterior of the vehicle. For passengers in a bus, train car, trolley car or taxicab, let alone a private car, this would be an unprecedented intrusion and a clear departure from Fourth Amendment case law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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